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WTO Dispute Settlement and Competition Law: Views from the Perspective of the Appellate Body's Experience

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Abstract

This Article explores the extent to which the dispute settlement system of the WTO would be suitable in resolving competition-related cases. It first recalls that under existing trade rules, national competition law and practice are not exempt from, but rather subject to, the application of the dispute settlement system. Both competition laws as such and their application in individual cases must comply with the current, substantive standards of the WTO Agreement, and complaints can be brought against both. Extending the application of the dispute settlement system to a new agreement to be negotiated in the area of competition would produce no qualitative innovation. Drawing a parallel to the area of trade remedies, this Article further argues that the standard of review applied in WTO dispute settlement would also be appropriate for competition cases. This standard of review excludes de novo review, but sets rather high standards for the national authorities' duties of investigation and explanation. The dispute settlement system, however, shows significant weaknesses in connection to the fact-finding conducted by panels. Competition-related cases–as is usual in the area of economic law in general, and of trade remedies in particular–are very fact-intensive. In the dispute settlement system of the WTO, it is the task of the panels to establish the facts, whereas the Appellate Body addresses only questions of law. In order to achieve the objective of establishing the relevant facts of a case, panels can resort to experts. They can also seek information from WTO Members, who must respond, lest they should face the risk of negative inferences being drawn from their behavior. A serious weakness, however, exists with regard to the treatment of confidential information, for which no generally applicable rules of procedure exist to date. For the dispute settlement system to be able to apply effectively to a review of individual decisions under a future WTO competition agreement, it would be important to overcome this impediment, which, already today, regularly creates significant practical problems. Another weakness is rooted in the non-permanent character of the panels. A body composed of ad hoc selected members cannot be expected to conduct fact-finding with the same determination as a permanent body. It would therefore be beneficial to increase the structural independence of panel members.

ARTICLES

WTO DISPUTE SETTLEMENT AND COMPETITION LAW: VIEWS FROM THE PERSPECTIVE OF THE APPELLATE BODY'S EXPERIENCE*

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ABSTRACT

The current discussions on a future framework for competition policy within the World Trade Organization ("WTO") have revealed reservations against the full application of the WTO dispute settlement system to such a framework. The current dispute settlement system of the WTO is one of the results of the Uruguay Round negotiations. For an international agreement of nearly universal scope, this system is unique in its obligatory and quasi-automatic character. In general, complaints can be brought to the WTO against national laws which fail to comply with WTO obligations and also against a WTO-inconsistent application of national laws in individual cases. The possibility of enforcing the legal obligations resulting from the agreements negotiated within the

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The Article is designed to be understandable to readers who are not familiar with all the intricacies of World Trade Oraganization ("WTO") law. It therefore contains many quotations of Agreements of the WTO and of Appellate Body Reports. This Article expresses only personal views, which should not be attributed to the WTO or its Members.

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WTO and the stronger force that these agreements thus have is one of the reasons why the proponents of a WTO competition agreement favor the WTO as a negotiation forum. Nevertheless, several of these proponents contemplate at most a limited future role for the WTO dispute settlement system within a future competition agreement. At the outset, the United States in particular took a skeptical approach, which the European Communities seem to have now joined in.

In order to address some of the objections voiced against the full application of the dispute settlement system in this area, this Article explores the extent to which the dispute settlement system of the WTO would be suitable in resolving competition related cases. It first recalls that under existing trade rules, national competition law and practice are not exempt from, but rather subject to, the application of the dispute settlement system. Both competition laws as such and their application in individual cases must comply with the current substantive standards of the WTO Agreement, and complaints can be brought against both. Extending the application of the dispute settlement system to a new agreement to be negotiated in the area of competition would therefore be no *qualitative* innovation.

Drawing a parallel to the area of trade remedies, this Article further argues that the standard of review applied in WTO dispute settlement would also be appropriate for competition cases. This standard of review excludes *de novo* review, but sets rather high standards for the national authorities' duties of investigation and explanation.

The dispute settlement system, however, shows significant weaknesses in connection to the fact-finding conducted by panels. Competition related cases — as is usual in the area of economic law in general, and of trade remedies in particular — are very fact-intensive. In the dispute settlement system of the WTO, it is the task of the panels to establish the facts, whereas the Appellate Body addresses only questions of law. In order to achieve the objective of establishing the relevant facts of a case, panels can resort to experts. They can also seek information from WTO Members, who must respond, lest they should face the risk of negative inferences being drawn from their behavior.

A serious weakness, however, exists with regard to the treatment of confidential information, for which no generally applicable rules of procedure exist to date. For the dispute settlement system to be able to apply effectively to a review of

individual decisions under a future WTO competition agreement, it would be important to overcome this impediment, which, already today, regularly creates significant practical problems. Another weakness is rooted in the non-permanent character of the panels. A body composed of *ad hoc* selected members cannot be expected to conduct fact-finding with the same determination as a permanent body. It would therefore be beneficial to increase the structural independence of panel members.

INTRODUCTION

This Article explores the question of whether and to what extent the current dispute settlement system of the WTO[1] is suitable for application to the area of competition law. In particular, it examines whether there are fundamental objections to using the WTO's current dispute settlement system in the framework of a future WTO Agreement on Competition.

The Article will be limited to problems specific to *dispute settlement* in the area of competition. There is no ambition to respond to the question of what kind of rules should be negotiated and agreed on for a future competition agreement within the WTO, be it by all or by some of the WTO Members. It is well known that this question is controversial. Not only do Members with different levels of economic development have different answers to this question, but there is also a divide between the European Communities and the United States. For the sake of simplicity, this Article assumes that negotiations will ultimately result in an agreement containing competition rules and that most of these rules will be binding on the signatories.[2]

The assumption of a successful conclusion of a WTO competition agreement is not even necessary for the discussion following hereafter. This Article will show that competition related behavior of WTO Members is already subject to the existing dispute settlement rules of the WTO. In any event, negotiations

1. The WTO has been created by the Marrakesh Agreement Establishing the World Trade Organization, LEGAL INSTRUMENTS-RESULTS OF THE URUGUAY ROUND vol. 1, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

2. For the background and the current state of discussions with regard to the possible content of a future WTO competition agreement, *see* Robert D. Anderson & Peter Holmes, *Competition Policy and the Future of the Multilateral Trading System*, 5 J. INT'L ECON. L. 531-63 (2002). *See also* the recent work of PHILIP MARSDEN, A COMPETITION POLICY FOR THE WTO (2003).

about a future WTO competition agreement will help the participants to sharpen their understanding of the problems involved. Whether they will reinforce or mitigate the problems that exist today will depend on the type and scope of the rules to be negotiated. In this context, one should think not only about the provisions of a future WTO competition agreement, but also about the reform of the existing dispute settlement rules.[3]

I. *DIGRESSION INTO THE RESULTS OF THE DOHA MINISTERIAL CONFERENCE*

It is anything but certain whether the Doha Ministerial Conference will truly result in negotiations about a future WTO competition agreement. The Ministerial Declaration seems to support such an assumption as it contains the following paragraphs about the subject:

> Interaction Between Trade and Competition Policy
> 23. Recognizing 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. [emphasis added]
> 24. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organisations, including UNCTAD, and through appropriate regional and bilateral

3. The Marrakech Ministerial Decision on the Application and Review of the Understanding on Rules and Procedures Governing the Settlement of Disputes of 1994 called for a full review of the DSU within four years after the entry into force of the WTO Agreement. The review started in 1997 but did not result in an agreement. Building "on the work done thus far", the Doha Ministerial Declaration contains a mandate for "negotiations on improvements and clarifications of the Dispute Settlement Understanding." WTO, *Ministerial Declaration*, Nov. 14, 2001, 4th Sess., Doha Ministerial conf. para. 30, WT/MIN(01)/DEC/1 (2001). The Members' reform proposals tabled to date are accessible at http://www.wto.org/english/tratop_e/ dispu_e/ dispu_e.htm. All WTO documents are *available at* http://docsonline.wto.org.

> channels, to provide strengthened and adequately resourced assistance to respond to these needs.
> 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 cooperation; 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.[4]

Paragraph 23 addresses "modalities" to be decided on for the future negotiations. It seems that the participants of the Doha Ministerial Conference reached agreement on the *principle* that negotiations on a competition agreement will start. Paragraph 23, however, mandates that a decision on "modalities" be taken "by explicit consensus." What will happen, if that decision by "explicit consensus" cannot be reached?

The Doha Ministerial Declaration does not stand in isolation: it is well-known that in order to overcome the resistance of the Indian delegation, Youssef Kamal, the Chairman of the Conference, issued a statement in which he explained his understanding of the "modalities" mentioned in paragraph 23. According to this understanding, the requirement of an "explicit consensus" gives "each Member the right to take a position on modalities that would prevent negotiations from proceeding after the Fifth Session of the Ministerial Conference until that Member is prepared to join an explicit consensus."[5] Whatever the status of this statement under public international law, it confirms the doubts raised by the requirement of an "explicit consensus" itself.[6]

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4. *Ministerial Declaration*, *supra* n.3, at para. 30.

5. *See* Chairman's statement, *available at* http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_chair_speaking_e.htm.

6. The concept of an "explicit consensus" cannot have been intended as an *oxymoron*. The attribute "explicit" therefore seems to suggest that, unlike in the case of an ordinary consensus requirement, the mere absence of objection from any Member is insufficient, but it is not clear how much more than that is required. The observation of Chairman Kamal could also be made about a normal consensus requirement if one understands "right" as "ability." If one understands "right" seriously, the statement goes beyond merely reflecting the obvious meaning of either a consensus or an explicit consensus requirement, given the Ministers' agreement "that negotiations will take place."

Even if, in principle, the start of negotiations on a competition agreement has been agreed, this says nothing so far about the outcome and the content. Paragraph 25 of the Ministerial declaration indicates that negotiations will probably deal with the topics which are to be clarified in the Working Group on the Interaction between Trade and Competition Policy, headed by Professor F. Jenny. These topics are: "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." Paragraph 23 indicates that the objective of negotiations should be "a multilateral framework to enhance the contribution of competition policy to international trade and development." However, would a multilateral framework necessarily consist of binding rules? Or could it also be a mixture of binding and non-binding rules? Or even an agreement containing no binding rules at all? The likelihood of such an agreement without any binding rules is ultimately quite low, given that the WTO – like its predecessor, the General Agreement on Tariffs and Trade ("GATT" or "GATT 1994") – has traditionally been a forum for the adoption of binding rules.

II. *COMMITMENTS TO ADOPT AND APPLY CERTAIN RULES AND THE ENFORCEMENT OF THESE COMMITMENTS*

Let us recall the hypothesis that a future WTO competition agreement will contain binding rules. Let us also recall the assumption that these rules will cover subject matters, which are to be further clarified in the consultations of the Working Group on the Interaction between Trade and Competition Policy. These subject matters are "hardcore" cartels, transparency, non-discrimination, and procedural fairness.

For the Members who will sign the agreement, these commitments will have a twofold meaning. First, they will have to *adapt* their national laws to the requirements of the agreement. They will therefore have to amend their national laws wherever such rules (e.g., on hardcore cartels or procedural fairness) are either absent or insufficient to meet fully the requirements of the agreement. Second, these Members will have to ensure that these adopted or modified national rules are *applied* in accor-

dance with the agreement. By outlining these two types of obligations, we presuppose what is standard in WTO law, but not necessarily in traditional public international law. Where an agreement prescribes or prohibits a certain conduct ("do not afford less favorable treatment"), what matters is the treatment actually afforded by that State. But with Article XVI:4, the WTO Agreement also focuses on the Members' laws and procedures that must conform to their obligations. In addition, it is likely that any future WTO competition agreement will expressly require Members not only to take certain actions, but also to adopt laws to that effect. In this regard, the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS Agreement") was an interesting precedent.

Within *disputes* between signatories about the fulfilment of the obligations arising from a future WTO competition agreement, one can also draw the distinction between controversies relating to the *amendment* of national laws and those relating to the *application* of these laws. The former will concern whether the responding Member has complied with its obligation to adapt its domestic law. The latter controversy will focus on whether the correctly implemented WTO obligations have been complied with in an individual case.

Normally it is not important to distinguish between these two obligations and their judicial enforcement. For the discussion about a future WTO competition agreement, however, this distinction has fundamental significance because there are very divergent views about the scope and the enforcement of these two kinds of obligations. The resistance of the United States to a binding competition agreement to be negotiated within the WTO is particularly directed at a multilateral review of the *application* of the rules to be agreed.

III. *THE DIFFERENT POSITIONS OF THE EUROPEAN COMMUNITIES AND THE UNITED STATES*

A. *The Fundamental Importance of the WTO Dispute Settlement System*

The famous Understanding on Rules and Procedures Governing the Settlement of Disputes, more simply called "Dispute Settlement Understanding" ("DSU"), which was negotiated in the Uruguay Round, provides for an obligatory and exclusive,

quasi-judicial system of adjudication. For a nearly universal international agreement, this system is unique in its automatic and obligatory character. Although the DSU builds on the practice and experience under the old GATT, the new system of WTO dispute settlement is fundamentally different from the former system, which was much more devoted to a diplomatic search for consensus. It is true that the DSU continues to contain non-judicial elements (such as the necessity of a formal adoption of panel and Appellate Body reports by the Dispute Settlement Body ("DSB"), but these non-judicial elements are significantly weaker than they have been and they are also much weaker than the elements of typical adjudication. This is particularly true for the appellate review, but at the same time not central to the subject of this Article.

The DSU itself emphasizes the fundamental importance of the dispute settlement system for the WTO. Article 3.2 of the DSU states, *inter alia*: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." Predictability and security are important for any legal system. In the WTO, these elements have additional importance because international trade is typically conducted by private economic operators, not by States, and private economic operators need stability and predictability for their commercial transactions.[7]

In accordance with its fundamental character, the WTO dispute settlement system applies to both of the previously mentioned types of disputes. In other words, it is available both for controversies regarding the legislative implementation of WTO obligations in domestic law and for controversies concerning compliance with these provisions where they are to be applied in an individual case.

B. *The Initial Position of the European Commission*

The new dispute settlement system of the WTO played a decisive role in the European Commission's reflection about the appropriate forum for the negotiation of a worldwide competi-

7. *See also* UNITED STATES – SECTIONS 301-310 OF THE TRADE ACT OF 1974, PANEL REPORT, WT/DS152/R Section 301 (Jan. 27, 2000), para. 7.77, 39 I.L.M. 452 (2000) [hereinafter U.S.–SECTION 301 PANEL REPORT]. WTO panel reports and Appellate Body Reports are *available at* http://www.wto.org/english/tratope/dispue/dispue.htm.

tion agreement. The Commission's Communication to the Council of the European Union, *Towards an international framework of competition rules* of June 18, 1996, stated with regard to the question of "which forum":

> The institutional infrastructure of the WTO includes a system of transparency and surveillance through notification requirements and monitoring provisions. These are common to many WTO/GATT Agreements. The WTO also provides a forum for continuous negotiation and consultation, where its Members could bring their trade-related competition concerns. Furthermore, the Organisation has a reinforced and legalised dispute settlement system between governments. This can back-up agreed rules and provide means for conflict resolution.[8]

In the opinion of the Commission, the WTO dispute settlement system is useful both for disputes about the legislative implementation of a competition agreement and for disputes about its application in individual cases. With particular regard to the question of dispute settlement procedures, the same Communication stated:

> Apart from its natural role as a permanent forum for negotiation adapting or strengthening agreed rules and obligations, the WTO also provides a compliance mechanism to help settle disputes between governments when a country claims that agreed WTO rules have been breached. . . . The WTO mechanisms could be applied if a country for example fails to set up a domestic competition structure or if it fails to react in a specific case to a request for enforcement action lodged by another WTO Member. The relevant rules could be adapted, if necessary, to the specificities of competition law and policy, and could be applied in a progressive way.[9]

C. *The Position of the United States*

In contrast to the European Communities, the United States is skeptical about the negotiation of a competition agreement within the WTO. This skeptical attitude relates both to negotiating binding rules and to the application of the WTO dispute settlement system. The United States has a particular aver-

8. COM (96)284 Final, *available at* http://www.europa.eu.int/comm/ competition/international/com284.html.

9. *Id.*

sion to the application of the dispute settlement system for reviewing individual national decisions in competition cases. On November 18, 1996, Joel Klein, then Acting Assistant Attorney General for Antitrust in the United States Department of Justice, stated in a much quoted speech before the Royal Institute of International Affairs in London:

> On the one hand, in the absence of broadly shared views on the precise objectives and supporting analysis applicable under competition laws, the use of dispute resolution with respect to a general requirement that [M]ember [S]tates adopt and enforce antitrust laws, and also consider requests to investigate from other [S]tates, is likely to have little impact on trade liberalization, and could in fact give procedural legitimacy to harmful actions masquerading as competition policy. On the other hand, if dispute settlement were extended to individual decisions taken by domestic competition authorities, this could interfere with national sovereignty concerning prosecutorial discretion[10] and judicial decision-making, and could also involve WTO panels in inappropriate reviews of case specific, highly confidential business information.[11]

In a later speech delivered in June of 1999, Klein stated that a review of individual decisions:

> [Would] involve the WTO in second-guessing prosecutorial decision making in complex evidentiary contexts – a task in which the WTO has no experience and for which it is not suited — and would inevitably politicize international antitrust enforcement in ways that are not likely to improve either the economic rationality or the legal neutrality of antitrust decision making.[12]

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10. For a demonstration that the exercise of such prosecutorial discretion already today is bound by General Agreement on Tariffs and Trade ("GATT") rules, *see infra* text accompanying n.49.

11. Joel I. Klein, *A Note of Caution with Respect to a WTO Agenda on Competition Policy, Address Before the Royal Institute of International Affairs* (Nov, 18, 1996), *available at* http://www.usdoj.gov/atr/public/speeches/jikspch.htm. In the same speech, Klein made the following remark: "Competition policy . . . is often very fact intensive, and to my knowledge no government has proposed turning over to a WTO body the kinds of confidential business information typically required for a proper competition analysis in particular cases."

12. Joel I. Klein, A Reality Check on Antitrust Rules in the World Trade Organization, and a Practical Way Forward on International Antitrust, Address Before the OECD Conference on Trade and Competition (June 30, 1999), OECD, Trade and Competition Policies: Exploring the Ways Forward (1999).

The position of the Assistant Attorney General is shared by the majority of the International Competition Advisory Committee, a body established by the Attorney General and the Assistant Attorney General for Antitrust. The majority opinion stated:

> Various concerns animate the Advisory Committee's skepticism toward competition rules at the WTO, including the possibility that the *quid pro quo* nature of WTO negotiations could distort competition standards; the potential intrusion of WTO dispute settlement panels into domestic regulatory practices; and the inappropriateness of obliging countries to adopt competition laws.[13]

In an impressive article, Daniel K. Tarullo gives a detailed explanation of the motives behind the aversion of U.S. competition policy makers to the WTO. Tarullo points out that the GATT and its successor organization, the WTO, are devoted to trade policy. The WTO and its Secretariat are thus dominated by trade policy makers. Trade policy follows different principles than competition policy. The objective of trade policy is to open up markets in the interest of exporters. From a competition policy perspective, it is feared that this interest will prevail in the WTO, even where existing market access barriers enhance economic efficiency and benefit consumers. From a competition policy standpoint, such a result is just as undesirable as the introduction of trade policy motivated import restrictions (such as anti-dumping duties, countervailing duties or other protective measures), when open market access would enhance economic efficiency and serve consumer interests. The dominance of trade policies within the WTO gives rise to the danger that competition policy measures would be "contaminated" by trade policy beliefs.[14] This danger exists both in the negotiation of com-

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13. UNITED STATES DEP'T OF JUSTICE, FINAL REPORT, INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST 278 (2000).

14. Ignacio García Bercero and Stefan D. Amarasinha have taken issue with this position, stressing that the world trading order is not about guaranteeing market access but about providing for equal competitive opportunities, so that both trade and competition policies play a complementary role in promoting the contestability of markets. *See* Ignacio García Bercero & Stefan D. Amarasinha, *Moving the Trade and Competition Debate Forward*, 4 J. INT'L ECON. L. 481, 501-02 (2001), relying on Edward M. Graham, *The Relationship Between International Trade Policy and Competition Policy*, *in* GLOBALIZATION UNDER THREAT Sec. 2 (Zdenek Drabek ed., 2001), *available at* http://www.wto.org/english/res_e/res_e/graham.doc. *See also* MARSDEN, *supra* n.2, at 125-29.

petition rules and in the enforcement of their application. Tarullo further points out that trade policy rules traditionally tend to be rather detailed and usually prohibit certain behavior by signatory States. Competition policy rules, in contrast, are relatively broad and require certain action by signatory States.[15] Tarullo finally draws attention to the fact that the dispute settlement system of the WTO is increasingly characterized by an atmosphere of conflict. Rather than conflicts, a successful conduct of competition policies at the international level requires that competition authorities cooperate in a spirit of mutual trust. Such cooperation would be impaired by the application of the WTO dispute settlement system.[16]

D. *Evolution of the Position of the European Commission Under the Influence of the United States' Negative Attitude*

The United States' negative attitude had a significant influence on the position of the European Communities. This evolution is apparent in three documents published in 1999. An internal discussion paper of the Commission states that "the basic function of dispute settlement would be to ensure that domestic competition law and enforcement structures are in accordance with the provisions agreed multilaterally."[17] The discussion paper continues:

> A more difficult and controversial issue is whether WTO dispute settlement could apply to a review of decisions taken by competition authorities in individual cases. . . . An option that could be explored is the establishment of a panel to consider alleged patterns of failure to enforce competition law to cases affecting the trade and investment of other WTO Members. . . . In any event there will be no review of individual decisions.[18]

In a Communication to the Council and the European Parlia-

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15. On the question of whether this claim can properly be made, *see infra* Sec. VI in fine.

16. Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT'L L. 478, 478-504 (2000). For a comment on some of these critical remarks, *see infra* Sec. VIII(A).

17. Discussion Paper, Trade and Competition 5 (Mar. 19, 1999), *available at* http://europa.eu.int/comm/competition/international.

18. *Id.* at 12; *see also* WTO, Working Group on the Interaction Between Trade and Competition Policy, *Communication from the European Community and its Member States*, WT/WGTCP/W/160, at 3 (Mar, 14, 2001).

ment of 1999, the Commission recommends the same line, but does not take up the previously mentioned option of reviewing patterns of competition law misapplication.[19] A 1999 communication of the European Communities and their Member States to the WTO Competition Working Group does not even mention dispute settlement.[20]

It is remarkable that — as it appears — the issue of applying the WTO dispute settlement system to a new WTO competition agreement has not been discussed at all, or not in much detail, in the annual reports of the Working Group on the Interaction Between Trade and Competition Policy.[21] These reports reflect that several proponents of a WTO competition agreement foresee at most a limited role for the dispute settlement system in this field and that this system should, in any case, not apply to individual decisions.[22]

IV. *THE SITUATION* DE LEGE LATA

The behavior of the European Communities is understandable, in the light of the U.S. resistance in particular and the state of the multilateral trading system after Seattle in general. It is probably motivated — at least in part — by considerations of negotiation strategy. We do not know whether the European Communities have fundamentally changed their position and

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19. Communication from the Commission to the Council and to the European Parliament, *The EU Approach to the Millennium Round*, COM (99) 0331 Final. *See also* Bercero & Amarasinha, *supra* n.14, at 494.

20. WTO, Working Group on the Interaction between Trade and Competition Policy, *Communication from the European Community and its Member States*, WT/WGTCP/W/115 (May 25, 1999).

21. *See* WTO, REPORT (1997) OF THE WORKING GROUP ON THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY TO THE GENERAL COUNCIL, WT/WGTCP/1 (November 28, 1997); WTO, REPORT (1998) OF THE WORKING GROUP ON THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY TO THE GENERAL COUNCIL, WT/WGTCP/2 (Dec. 8, 1998); WTO, REPORT (1999) OF THE WORKING GROUP ON THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY TO THE GENERAL COUNCIL, WT/WGTCP/3 (Oct. 11, 1999), para. 79; WTO, REPORT (2000) OF THE WORKING GROUP ON THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY TO THE GENERAL COUNCIL, WT/WGTCP/4 (Nov. 30, 2000), at para. 79; WTO, REPORT (2001) OF THE WORKING GROUP ON THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY TO THE GENERAL COUNCIL, WT/WGTCP/5 (Oct. 8, 2001), at paras. 87-91.

22. WTO, REPORT (2001) OF THE WORKING GROUP ON THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY TO THE GENERAL COUNCIL, *supra* n.21, at para. 87; *see also* WTO, REPORT (1999) OF THE WORKING GROUP ON THE INTERACTION BETWEEN TRADE AND COMPETITION Policy to the General Council, *supra* n.21, at para. 79.

have lost their interest in the application of the WTO dispute settlement system in principle. It is therefore worthwhile to examine the extent to which it is already possible to invoke the dispute settlement system in order to review the compatibility of national competition laws and their application with existing WTO law.

V. *THE THREE DIFFERENT TYPES OF COMPLAINTS UNDER THE GATT*

The WTO dispute settlement system applies to all WTO agreements, in particular to the GATT 1994. According to Article XXIII:1 of the GATT 1994 (which applies by reference to most other WTO agreements), a successful complaint depends on the nullification or impairment of a benefit accruing to the complaining Member directly or indirectly under the GATT 1994 or the impediment of the attainment of any objective of the GATT 1994. This requirement can be met in the following three ways set out in Article XXIII:1 of the GATT 1994:

> (a) the failure of another contracting party to carry out its obligations under this Agreement (so-called violation complaint); or
> (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement (so-called non-violation complaint); or
> (c) the existence of any other situation (so-called situation complaint).

This Article focuses on the first of these possibilities, i.e., the so-called violation complaint. As was already the case under the old GATT, violation complaints in practice play a much greater role than non-violation complaints. Additionally, several violation complaints have had links to competition related issues.[23] Nevertheless, we will briefly return to the non-violation complaint towards the end of this Article for the following simple reason: in the short history of the WTO, there has been one (unsuccessful) non-violation complaint with strong links to competition law. In contrast, a situation complaint never became the object

23. For examples of violation claims, *see e.g.*, JAPAN — MEASURES AFFECTING CONSUMER PHOTOGRAPHIC FILM AND PAPER, PANEL REPORT WT/DS44/R (Apr. 22, 1998) [hereinafter JAPAN — FILM PANEL REPORT]; KOREA — MEASURES AFFECTING IMPORTS OF FRESH, CHILLED AND FROZEN BEEF, PANEL REPORT, WT/DS161/R, WT/DS169/R, and APPELLATE BODY REPORT, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000).

of a panel or Appellate Body report.[24]

VI. *THE REVIEW OF COMPETITION LAWS AS SUCH*

It is well known that the GATT 1994, which is an integral part of the WTO Agreement, is based on two principles of non-discrimination. These are the principle of most-favored-nation treatment and the principle of national treatment of imported goods. The GATT 1994 and, more generally, the WTO Agreement, are based on other fundamental principles, such as transparency, but for the sake of simplicity, this Article focuses on the principle of national treatment.[25] This principle is also likely to have the greatest practical relevance. As an illustration, it suffices to recall the occasional reproach that national competition law is applied more strictly to foreign competitors than to domestic ones.

The same principle applies to services, according to Article XVII of the General Agreement on Trade in Services ("GATS"), and to intellectual property protection, according to Article 3 of the TRIPS Agreement. Article XVII of the GATS, however, only applies when and in so far as a WTO Member has made market access commitments, and in its schedule that Member may have subjected it to limitations. For the sake of brevity and simplicity, Article XVII of the GATS and Article 3 of the TRIPS Agreement will not be addressed separately in this Article. *Mutatis mutandis*, the statements about Article III:4 of the GATT 1994 also apply to those provisions.

Article III:4, first sentence, of the GATT 1994 provides:

> The products of the territory of any contracting party [Member] imported into the territory of any other contracting party [Member] shall be accorded treatment no less favorable 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.

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24. This non-violation dispute is JAPAN—FILM PANEL REPORT, *supra* n.23. With regard to the *potential* role of situation complaints, *see infra* Sec. XI.

25. For a detailed discussion of the three mentioned principles in the previous practice of the GATT and the WTO, *see* WTO, Working Group on the Interaction between Trade and Competition Policy, *The Fundamental WTO Principles of National Treatment, Most-Favored-Nation Treatment and Transparency*, Background Note by the Secretariat, WT/WGTCP/W/114 (Apr. 14, 1999).

There can be no doubt that a piece of national competition legislation belongs to those provisions that have to comply with Article III:4 of the GATT. A national competition act falls within the category of "laws, regulations and requirements affecting (the) internal sale, offering for sale, purchase, transportation, distribution or use" of goods. A different opinion would be possible only if the verb "affecting" were to be interpreted narrowly, which, however, is not the case. Already the panel in the case of *Italian Discrimination Against Imported Agricultural Machinery* found that, due to the verb "affecting", Article III:4 covers "any laws or regulations which might adversely modify the conditions of competition" of imports.[26] The recent Appellate Body Report in the second dispute about the tax treatment of Foreign Sales Corporations confirms this proposition: the word "affecting" in Article III:4 of the GATT 1994 has "a broad scope of application."[27]

Since Article III:4 of the GATT 1994 expressly applies only to governmental *treatment* accorded in respect of "laws, regulations and requirements", it would not seem to be a possible yardstick of legal scrutiny wherever competition rules are completely non-existent.

It is not overly likely,[28] yet certainly not impossible, that competition laws as such will be scrutinized under Article III:4 and will not pass this scrutiny. There are several reasons for this. First, there will hardly be any competition laws which, as such, treat imports less favorably than like domestic goods, be it *de jure* or *de facto*. This is especially true if the competition law at issue applies to all products, whatever their nature, whatever their origin. Such a law could only violate Article III:4 of the GATT 1994 in a case where imports must be treated differently from like

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26. ITALIAN DISCRIMINATION AGAINST IMPORTED AGRICULTURAL MACHINERY, PANEL REPORT, B.I.S.D. 7S/60, at para. 12 (Oct. 23, 1958). GATT panel reports are *available at* http://www.wto.org/english/tratop e/dispu e/gt47ds e.htm.

27. UNITED STATES – TAX TREATMENT FOR "FOREIGN SALES CORPORATIONS" – RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE EUROPEAN COMMUNITIES, APPELLATE BODY REPORT, WT/DS108/AB/RW (Jan. 14, 2002), at paras. 209-10, referring to EUROPEAN COMMUNITIES – REGIME FOR THE IMPORTATION, SALE AND DISTRIBUTION OF BANANAS, APPELLATE BODY REPORT, WT/DS27/AB/R (September 25, 1997), para. 220 [hereinafter EC – BANANAS III APPELLATE BODY REPORT] and CANADA – CERTAIN MEASURES AFFECTING THE AUTOMOTIVE INDUSTRY, APPELLATE BODY REPORT, WT/DS139/AB/R, WT/DS142/AB/R, (June 19, 2000), at para. 150.

28. *See also* Bercero & Amarasinha, *supra* n.14, at 494.

domestic goods in order to afford both equally favorable treatment.[29] As convincing as this basic understanding of the national treatment obligation might be, it is difficult to apply this aspect in practice. Accordingly, the exact scope of the prohibition of this kind of *de facto* discrimination is yet to be clarified.[30] Conversely, it is not impossible that the case will be made that, due to the particular structures of a particular market, the application of the same standards to imports and to like domestic products accords to the latter less favorable treatment.

It may also be, and this is more likely, that there are special laws, or sub-legislative regulations which apply only to a certain category of products (of whatever origin), for instance (block) exemptions. If, as a result, there is a difference in the treatment of some imports (those not falling under the exemption) and some like domestic goods (those covered by the exemption) and this difference is simultaneously a competitive disadvantage for the excluded imports, there *may* be a breach of Article III:4 of the GATT 1994. Whether such a regime violates the national treatment obligation will depend on whether the mere differentiation is sufficient or whether there has to be a disadvantage for like imports, those covered and those not covered by the block exemption, taken together, compared with like domestic goods, taken together. This question is yet to be resolved with final clarity in the WTO jurisprudence.[31]

An instance of *de jure* discrimination would, of course, exist where access to competition law is limited to domestic firms[32] or

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29. *See* UNITED STATES – SECTION 337 OF THE TARIFF ACT OF 1930, PANEL REPORT, B.I.S.D. 36S/345 (Nov. 7, 1989), at para. 5.11. The European Communities have proposed to limit the national treatment obligation of a future competition agreement to outlawing *de jure* discrimination and to apply it only to the competition law framework of a Member. *See* Communication from the European Communities and Its Member States, A Multilateral Framework Agreement on Competition Policy, WT/WGTCP/W/152, at 6 (Sept. 25, 2000). To avoid a possible misunderstanding, it should therefore be emphasized that *de facto* discrimination can be found not only in the manner in which the administrative authorities apply a piece of competition law, but also in the law itself.

30. *See* Lothar Ehring, *De Facto Discrimination in WTO Law: National and Most-Favored-Nation Treatment — or Equal Treatment?*, 36 J. WORLD TRADE 921, at 925, n.10 (2002). It must be remembered that the legal order of the GATT, with just a few hundred dispute settlement decisions to date (including decisions reached under the GATT 1947), is a very young legal order and many fundamental questions have yet to be resolved.

31. *See id.* at 921-48.

32. *See* Organization for Economic Cooperation and Development, *Competition Ele-*

where an exemption from competition law differentiates according to the origin of the products in a way that is detrimental to like imports. It has, for example, been argued that the exemption of export cartels from the prohibition of restrictive business practices is a violation of national treatment.[33]

Where a piece of competition legislation exceptionally (and potentially) affords like imports less favorable treatment, this treatment might not be mandatory, but be left to the discretion of the competent authorities. In such a case, one would apply the traditional GATT doctrine of distinguishing between mandatory and discretionary laws. Only mandatory legislation can, in principle, be challenged successfully as being GATT-inconsistent as such.[34] In contrast, in the case of non-mandatory (discretionary) legislation, the complainant must wait for an instance of GATT-inconsistent application.[35] The traditional GATT practice relies on the presumption that States comply with their international obligations in good faith and will avoid behavior that violates international law. Many national legal systems also contain an unwritten principle of legal interpretation, according to which — to the extent possible — national law is to be interpreted in accordance with international legal obligations. Within some limits, this part of national law is also to be taken into account. One could, however, also draw the distinc-

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ments in International Trade Agreements: A Post-Uruguay Round Overview of WTO Agreements, COM/TD/DAFFE/CLP(98)26/FINAL, at 11 (Jan. 28, 1999).

33. It is debatable whether such an exemption violates the national treatment obligation. Imports, which do not enjoy the exemption, are obviously treated less favorably than the exempted exports. One can, therefore, not rule out the relevance of national treatment with the argument that this obligation only concerns imports and not exports (as it is being ruled out in the WTO's *Special Study on Trade and Competition Policy*, in WTO, 1997 ANNUAL REPORT 64 (1997)). The question, however, is whether the analysis of less favorable treatment correctly consists in a comparison of the treatment of imports with (among other things) the treatment of like exports or whether imports must be compared solely with the domestic goods destined for the domestic market. We do not intend to resolve this question here. On this question, see Ehring, *supra* n.30, at n.235.

34. Ultimately, it depends on the WTO provision in question, whether it precludes only mandatory inconsistent laws or also discretionary ones. SEE U.S. — 1974 SECTION 301 PANEL REPORT, *supra* n.7, at paras. 7.53-7.54.

35. UNITED STATES – ANTI-DUMPING ACT OF 1916, APPELLATE BODY REPORT, WT/DS136/AB/R, WT/DS162/AB/R (Aug. 28, 2000), at paras. 88-89, with reference to UNITED STATES MEASURES AFFECTING THE IMPORTATION, INTERNAL SALE AND USE OF TOBACCO, PANEL REPORT, B.I.S.D. 41S/I/131 (Oct. 4, 1994) and several other older GATT Panel Reports. *See also* UNITED STATES – SECTION 211 OMNIBUS APPROPRIATIONS ACT OF 1998, APPELLATE BODY REPORT, WT/DS176/AB/R (February 1, 2002), para. 259.

tion somewhat differently and accept as WTO-compatible only discretionary legislation which, while not excluding that imports receive less favorable treatment, does not, in itself, include any such less favorable treatment for imports. That would be the case, for instance, where the law prescribes a certain treatment for domestic goods, but leaves it to the administrative institutions applying the law to treat imports as favorably or less favorably.[36]

For the reasons outlined above, in the event of a complaint against a norm that is mandatory but leaves room for various interpretations, both a panel and the Appellate Body are likely to accept an interpretation that is favorable to WTO law. In other words, they are likely to accept an interpretation that is consistent with the obligations of the responding Member.[37]

As a preliminary result we can summarize: competition laws of WTO Members are currently subject to the dispute settlement system. The national treatment obligation prescribed by Article III:4 of the GATT 1994 is probably the most important test. It is not likely, yet not impossible, that a competition law *per se* violates Article III:4.

A competition agreement to be negotiated within the WTO would significantly increase the number of legal requirements to which national competition laws are subject. Such an agreement would probably also contain express obligations as to the introduction of competition laws. These obligations would go beyond those that, already today and at least implicitly, can be derived from individual special provisions of the WTO agreements. For instance, such an obligation can be derived from Article VIII of the GATS, which states:

> 1. Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsis-

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36. In that case, discretion would exist only on the one side of the spectrum, that is, for imports and it would exist only in the one direction of worse treatment. Hence, the law itself is less favorable (due to the legal possibility of worse treatment) for imports than it is for domestic goods (which do not risk the same kind of worse treatment).

37. *See* UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN HOT-ROLLED STEEL PRODUCTS FROM JAPAN, APPELLATE BODY REPORT, WT/DS184/AB/R (July 24, 2001), at paras. 200-08 [hereinafter UNITED STATES – HOT-ROLLED STEEL APPELLATE BODY REPORT].

> tent with that Member's obligations under Article II and specific commitments.
> 2. Where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments. . . .
> 5. The provisions of this article shall also apply to cases of exclusive service suppliers, where a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory.

In addition to Article VIII of the GATS,[38] the Telecommunications Annex to the GATS requires that service providers in other Members be given access to public telecommunications networks on reasonable and non-discriminatory terms. The Telecommunications Reference Paper on Regulatory Principles further provides for certain "competitive safeguards." Under the terms of the Reference Paper, the WTO Members who signed it are obliged to maintain "[a]ppropriate measures . . . for the purpose of preventing . . . major suppliers from engaging in or continuing anti-competitive practices."[39] Members must also ensure interconnection with major suppliers under non-discriminatory terms, in a timely manner, on transparent, reasonable, cost-oriented and unbundled terms.[40] The "appropriate measures" that Members must maintain arguably include both the enactment of competition laws and their enforcement in individual cases.

In 2000, the United States brought against Mexico the first complaint under the Reference Paper.[41] After lengthy consultations between the parties, the panel in this dispute was established on April 17, 2002. At the request of the United States, the

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38. For an example of a dispute relating to Article VIII of the General Agreement on Trade in Services ("GATS"), *see* Request for Consultations by the United States on *Belgium - Measures Affecting Commercial Telephone Directory Services*, WT/DS80/1 (May 13, 1997).

39. Negotiating Group on Basic Telecommunications, Reference Paper, at para 1.1 (Apr. 24, 1996), *available at* http://www.wto.org/english/news_e/pres97_e/refpap_e.htm.

40. *Id.* at para. 2.

41. Request for Consultations by the United States in *Mexico – Measures Affecting Telecommunications Services*, WT/DS/204/1 (Aug. 17, 2000).

Director-General of the WTO composed the panel on August 26, 2002, because the parties were unable to agree on the selection of panel members.[42] The United States alleges that Mexico violated its GATS obligations resulting from the Annex on Telecommunications and the Reference Paper. The dispute raises questions of access to public telecommunications networks and discrimination against foreign services suppliers. It involves the examination of the position and conduct of a commercial operator, Telmex, and the alleged failure of Mexico to enforce competitive safeguards. At the time of writing, the United States had just filed its first written submission to the Panel,[43] so that a ruling can be expected around mid-2003.

Beyond Article VIII and the Reference Paper, the GATS also addresses restrictive business practices of non-monopoly service suppliers. Article IX states:

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

Article 40 of the TRIPS Agreement not only allows Members to enact laws against the anti-competitive abuse of licenses on intellectual property rights. It also obliges Members to enter into consultations with any other Member which believes that its competition laws are being infringed by the licensing practices of a foreign intellectual property right owner.

The thesis that trade policy chiefly deals with negative prohibitions directed at Members, and not with positive obligations to take action,[44] is no longer tenable since the conclusion of the Uruguay Round. The TRIPS Agreement is the best example of a host of far-reaching positive obligations to take action,

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42. *Note by the Secretariat on Mexico — Measures Affecting Telecommunications Services*, WT/DS204 (Oct. 3, 2002).

43. *Available at* http://ustr.gov/enforcement/briefs.shtml.

44. *See* Tarullo, *supra* n.16, at 489. *See also supra* n.15 and accompanying text.

that are likely to exceed by far what can be expected from a competition agreement even under a best case scenario.

It is interesting to note that Article 1501 of the North American Free Trade Agreement ("NAFTA") sets out the obligation "to proscribe anti-competitive business conduct and to take appropriate action" in that respect. However, Article 1501(3) expressly excludes these obligations of Article 1501 from the scope of application of NAFTA dispute settlement. For monopolies and State enterprises, Articles 1502 and 1503 contain more specific obligations aiming to ensure that other NAFTA obligations are not undermined. Under Article 1116, an investor is also able to invoke certain provisions of Articles 1502 and 1503 in an arbitration under Chapter 11 of NAFTA, as it is currently the case in the *Arbitration, United Parcel Service (UPS) vs. Canada* (award on jurisdiction rendered on November 22, 2002). In this competition related dispute, UPS also alleges that the Canadian government violated the national treatment obligation under Article 1102, given the treatment accorded to Canada Post.

VII. *THE REVIEW OF INDIVIDUAL COMPETITION DECISIONS*

More interesting and complicated than the question of the review of competition laws as such is the issue of reviewing the behavior of competition authorities in individual cases. In other words, are WTO Members already subject to the WTO dispute settlement system in their application of competition laws and, if so, to what extent?

For the reasons outlined above,[45] the starting point of the analysis should again be Article III:4 of the GATT. The national treatment obligation of Article III:4 expressly applies to "laws, regulations and requirements." Individual decisions of competition authorities can fall under the concept of "requirements." The Appellate Body has so far not had opportunity to express itself on the interpretation of this term. At least one panel report clearly expressed itself in favor of understanding individual decisions as falling within that category. The report, *Canada – Administration of the Foreign Investment Review Act*, states with regard to undertakings that have been made by foreign investors in individual cases and accepted by the Canadian authorities:

45. *See supra* Sec. VI.

> 5.4 . . . The Panel . . . noted that written purchase undertakings – leaving aside the manner in which they may have been arrived at (voluntary submissions, encouragements, negotiation, etc.) – once they were accepted, became part of the conditions under which the investment proposals were approved, in which case compliance could legally be enforced. The Panel therefore found that the word "requirements" as used in Article III:4 could be considered a proper description of existing undertakings.
> 5.5. The Panel could not subscribe to the Canadian view that the word "requirements" in Article III:4 should be interpreted as "mandatory rules applying across he board" because this latter concept was already more aptly covered by the term "regulations" and the authors of this provision must have had something different in mind when adding the word "requirements." The mere fact that the few disputes that have so far been brought before the contracting parties regarding the application of Article III:4 have only concerned laws and regulations does not in the view of the Panel justify an assimilation of "requirements" with "regulations." The Panel also considered that, in judging whether a measure is contrary to obligations under Article III:4, it is not relevant whether it applies across the board or only in isolated cases. Any interpretation which would exclude case-by-case action would, in the view of the Panel, defeat the purposes of Article III:4.[46]

In addition to these considerations as to whether individual decisions by competition authorities can be qualified as "requirements", it should be pointed out that Article III:4 does not prohibit less favorable treatment "*in*" or "*through* laws, regulations and requirements", but "*in respect of* all laws regulations and requirements." It would seem plausible to hold that the application of a law qualifies as "treatment . . . in respect of" that law.

Individual competition decisions can be made by the executive or by courts. Decisions by administrative authorities are typical in Europe, whereas in the United States such decisions are left to the courts. For the application of Article III:4, this distinction is irrelevant. Despite the fact that judiciaries are usually in-

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46. CANADA — ADMINISTRATION OF THE FOREIGN INVESTMENT REVIEW ACT (FIRA), PANEL REPORT, B.I.S.D. 30S/140 (Feb. 7, 1984). *See also* EEC — REGULATIONS OF IMPORTS OF PARTS AND COMPONENTS, PANEL REPORT, B.I.S.D. 37/132 (May 16, 1990). Article XXVIII:(a) of the GATS defines the term "measure" as follows: "'measure' means any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form."

dependent in countries living under the rule of law, States are responsible for the acts of their courts as they are responsible for the actions taken by their administrative authorities.

The distinction between the European and U.S. decision structures would be eliminated if a WTO dispute settlement procedure could be initiated only after exhausting domestic remedies. However, such a requirement does not exist in WTO law as a matter of positive law. A Member may bring a case to the dispute settlement system in the event of any breach of the WTO Agreement (and the then presumed nullification or impairment of a benefit). This main condition of a violation of WTO law is satisfied as soon as the legislature or the executive acts inconsistently with the Member's WTO obligations. Accordingly, in the dispute settlement practice to date, no report has made the exhaustion of domestic remedies a prerequisite. Such a prerequisite would also be at odds with the principle of prompt settlement of disputes, which is expressed by the short deadlines under which panels and the Appellate Body, as well as the DSB in its adoption of panel and Appellate Body reports, operate.[47]

Article III:4, one may think, applies only when a competition authority or a court has *made* a decision, not if they have *failed* to act. This obviously appears to impose a limit on the enforcement of the national treatment obligation in competition law. A legal assessment of the supervisory activity of a national competition authority depends on a review not only of the decisions made, but also of the decisions that have not been made. In other words, competition law can be breached by a competition authority through action as well as through inaction. An excessive penalty on a certain cartel is, from a legal point of view, as problematic as the failure to prosecute a similarly illegal other cartel. Despite the mentioned limitation of Article III:4, it would go too far to suggest that, as a matter of principle, instances of inaction by competition authorities cannot be inconsistent with the national treatment obligation: only complete inaction would appear not to qualify as "treatment" in the sense of Article III:4. There is no such complete inaction, and

47. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, Annex 2, LEGAL INSTRUMENTS – RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 1226 (1994) [hereinafter DSU], arts. 3.3, 12, 17, 20 and 21.

there *can* be less favorable governmental treatment, where the competition authorities have taken no action in one case but have acted so in another, similar case.

More serious is another limit to the application of Article III:4 to individual decisions. A violation of Article III:4 requires proof that imported goods are treated less favorably than like domestic goods. Such proof will exist when a competition authority adopts different decisions with regard to two agreements relating to like goods. For instance, the competition authority could authorize an exclusive retail system to the benefit of a domestic producer, whilst prohibiting a similar exclusive retail system for like imported goods. To take another example, the competition authority could refrain from intervening against a buying cartel that refuses to purchase imports, thereby departing from that authority's usual practice with regard to buying cartels that harm domestic products.[48] This makes clear that the national treatment obligation, as a matter of principle, limits the prosecutorial discretion which some competition authorities enjoy.[49] It is easy to find hypothetical examples, but in practice it may well be difficult to prove that there has been a violation of the national treatment obligation. The application of Article III:4 to individual decisions of competition authorities will therefore, in practice, remain the exception. In addition, where individual decisions by competition authorities contravene Article III:4, the Member concerned may invoke Article XX(d) as a justification.[50] Lastly, due to resource constraints and political reasons for a certain selectivity, Member governments (which are the only ones able to bring a complaint to the WTO) may be reluctant to invoke the dispute settlement system because of an individual decision, and rather prioritize disputes relating to

48. Mitsuo Matsushita, *Restrictive Business Practices and the WTO/GATT Dispute Settlement Process*, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 357, 370 (Ernst-Ulrich Petersmann ed., 1997).

49. Anderson & Holmes, *supra* n.2, at 533. *See also supra* Sec. III.C.

50. Article XX(d) of the GATT 1994 allows Members to derogate from GATT obligations when they adopt measures "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement," "[s]ubject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade." It is hence necessary that the competition law to be enforced be in itself non-discriminatory, but also that the individual measure be "necessary." This is not the case where less discriminatory conduct would equally achieve the objective pursued.

breaches of WTO law affecting more than one economic actor.[51] This, however, does not detract from the principle that, already today, the WTO dispute settlement system applies to individual decisions in the area of competition law.

Some critical observers may disagree with one or the other aspect of the above interpretation of Article III:4 of the GATT. However, they cannot deny that, for example, Article VIII of the GATS demands individual actions in competition cases and that disputes about compliance with this Article are subject to the WTO dispute settlement system.

In addition to Article III:4 of the GATT 1994, other existing provisions of WTO law may be relevant to the conduct of national competition authorities in individual cases. For example, Article 11.3 of the Agreement on Safeguards provides that "Members shall not encourage or support the adoption or maintenance" of non-governmental measures equivalent to a voluntary import or export restraint. In other words, Article 11.3 prohibits governmental encouragement and support of import or export cartels. It has been suggested in the literature that the terms "encourage or support" could be interpreted broadly so as to cover the non-application of existing anti-cartel legislation,[52] and that Article 11.3 could be the basis for building a jurisprudence relating to restrictive business practices.[53] From a textual point of view, "support" seems to mean more than just "tolerate."[54] On the other hand, one may argue that the intentional non-application of competition laws that would normally (have to) be applied can be a strong form of support. It has also been suggested that the *authorization* of import cartels as it exists in some national competition legislation could qualify as a positive contribution to a restrictive business practice because it brings

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51. Due to the economic importance of certain companies, their access to the political power or their readiness to bear the costs of a WTO dispute, there are undoubtedly exceptions to this rule.

52. Frieder Roessler, *The Concept of Nullification and Impairment in the Legal System of the World Trade Organization*, in INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 123, 140 (Ernst-Ulrich Petersmann ed., 1997); Frieder Roessler, *Should Principles of Competition Policy be Incorporated into WTO Law Through Non-Violation Complaints?*, 2 J. INT'L ECON. L. 413, 421 (1999).

53. Roessler, *Should Principles of Competition Policy Be Incorporated into WTO Law Through Non-Violation Complaints?*, *supra* n.52, at 421.

54. *See also* Matsushita, *supra* n.48, at 369 ("too remote a linkage with any governmental action"); Marsden, *supra* n.2, at 144.

that practice about.[55] It is again the question whether a legislative exemption (possibly coupled with an approval requirement) suffices for satisfying the condition "encourage or support."[56] This question does not arise in the event of informal governmental guidance or suggestion, as this is precisely the kind of governmental contribution that the words "encourage or support" contemplate.[57]

The result is clear: under the current framework, both the competition laws of WTO Members and the application of those laws in individual cases are subject to the WTO dispute settlement system. Extending this dispute settlement system to a binding competition agreement to be negotiated within the WTO would, therefore, be no qualitative *novum*. However, in quantitative terms, such an agreement would significantly extend the obligations of WTO Members in the area of competition and the scope of the WTO dispute settlement system.

This section has focused on WTO obligations relating to the area of competition where the government plays no other role than supervising private competitors. It is clear that where the government's role has a different quality, additional WTO obligations can become relevant. For instance, a government's positive contribution[58] to anti-competitive behavior amounts to a violation of Article XI:1 of the GATT 1994 and possibly Article 11 of the Agreement on Safeguards where this behavior has the effect of restricting imports or exports. In other cases, such contribution can violate the national treatment obligation. Pursuant to Article 3.4 of the Agreement on Technical Barriers to Trade, Members must not encourage private testing and certification organizations to discriminate against foreign products. Where the government itself becomes the economic operator having exclusive import or export rights, Article XVII of the GATT 1994 mandates the respect of the GATT's non-discrimination disciplines and transactions to be made "solely in accordance with commercial considerations." Finally, the *grant* of monopoly

55. *Id.* at 368.

56. One may argue that a legislative exemption is no more a positive contribution ("encourage or support" arguably require a positive contribution) than an administrative inaction where the law does prohibit the cartel. See, however, *id.* at 368–69.

57. *Id.* at 368–69.

58. *Id.* at 368 (using the term "precipitation").

rights can contravene the national treatment obligation where the monopoly is bestowed on a domestic operator.

VIII. *STANDARD OF REVIEW*

A. *General Remarks*

At least in developed legal systems, decisions in the field of competition are made in administrative and/or judicial proceedings that ensure not only an optimal clarification of the facts and the law, but also procedural fairness. Does the WTO dispute settlement system allow for an appropriate international review of such national proceedings? Or is the dispute settlement system unable to serve the purpose of such review?

Competition law is part of economic law. As such, it demands not only special legal expertise, but also a good understanding of the economic context and of economics as a discipline. The arguments derived from these facts are well known by all those who follow the current debate about the modernization and decentralization of the competition law of the European Communities. The dispute settlement system need not fear these arguments, given that competition disputes panels, which are responsible for establishing the facts of a case, could be composed of experts who are familiar with the questions arising in competition law.[59] The current panel system may well be problematic in many regards,[60] but the flexibility in the selection of panelists allows for a tailor-made panel of experts in the respective area of a given dispute. The above-mentioned objection about the risk of "contamination" by trade policy considerations[61] can therefore easily be refuted. A future WTO competition agreement could also expressly provide for the selection of panelists to ensure that panels have the relevant specific expertise.[62] Finally, it should be recalled that panels can resort to experts.[63]

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59. DSU, *supra* n.47, art. 8.

60. *See infra* Sec. IX.G.

61. *See supra* Sec. III.C.

62. Such as provided in the *Decision on Certain Dispute Settlement Procedures for the General Agreement on Trade in Services* and in paragraph 4 of the GATS Annex on Financial Services.

63. Article 13.2 of the DSU gives every Panel the right to seek expert advice. In the past, panels confined themselves to consulting experts about scientific questions. Nevertheless, nothing prevents a panel from hearing experts on economic questions, in

Competition decisions are not the only instances in which an optimal exploration of the facts must be reconciled with procedural fairness. Similar problems arise in procedures about safeguard measures or anti-dumping and countervailing duties. In all these procedures, the problem to be solved at the level of WTO dispute settlement is the same. On the one hand, it would be inept to repeat the entire investigation that has been conducted by the national authorities and/or courts. For a number of reasons, a WTO panel would not even be in the position to do so. On the other hand, it would be highly unsatisfactory if a WTO panel were to review only compliance with purely formal, procedural aspects in the national investigation procedure. The optimal standard of review therefore has to be positioned between these two extremes.

B. *The General Standard of Review of Article 11 of the DSU*

Relatively early on, in the well-known *Hormones* Report, the Appellate Body stated that a panel's standard of review is generally stipulated by Article 11 of the DSU.[64] The relevant part states: "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements."[65] The only apparent exception to this principle is Article 17.6(i) of the Anti-Dumping Agreement, discussed below.

Subsequently to the *Hormones* Report, a number of Appellate Body Reports further clarified and refined the standard of review for complex fact-finding exercises in domestic investigations. The starting point is the following passage from the *Hormones* Report:

> [The] applicable standard is neither *de novo* review as such, nor "total deference," but rather the "objective assessment of the facts." Many panels have in the past refused to undertake

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particular with regard to events that are relevant from a competition law perspective. Also for this reason, the argument of threatening "contamination" by trade policy mentalities is unjustified.

64. EUROPEAN COMMUNITIES — MEASURES CONCERNING MEAT AND MEAT PRODUCTS (HORMONES), APPELLATE BODY REPORT, WT/DS26 and WT/DS48 (Feb. 13, 1998), at paras. 115–17 [hereinafter EC — HORMONES APPELLATE BODY REPORT].

65. DSU, *supra* n.47, art. 11, *reprinted in EC — Hormones Appellate Body Report, supra* n.64, at para. 116.

> *de novo* review, wisely, since under current practice and systems, they are in any case poorly suited to engage in such a review. On the other hand, "total deference to the findings of the national authorities," it has been well said, "could not ensure an 'objective assessment'" as foreseen by Article 11 of the DSU.[66]

The Appellate Body Report in *Argentina — Footwear* states with regard to the investigative obligations of national authorities under Article 4 of the Agreement on Safeguards:

> To determine whether the safeguard investigation and the resulting safeguard measure applied by Argentina were consistent with Article 4 of the *Agreement on Safeguards*, the Panel was obliged, by the very terms of Article 4, to assess whether the Argentine authorities had examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination.[67]

In *United States — Wheat Gluten*, the Appellate Body had the opportunity to refine the national authorities' investigative obligations in safeguard cases and thereby to further clarify the panels' standard of review. According to the Appellate Body, Articles 3 and 4 of the Agreement on Safeguards require national authorities to look for relevant information *ex officio*:

> If the competent authorities consider that a particular, "other factor" may be relevant to the situation of the domestic industry . . . their duties of investigation and evaluation preclude them from remaining passive in the face of possible shortcomings in the evidence submitted, and views expressed, by the interested parties. In such cases, where the competent authorities do not have sufficient information before them to evaluate the possible relevance of such an "other factor", they must investigate fully that "other factor", so that they can fulfil their obligations of evaluation . . . Therefore, the competent authorities must undertake additional investigative steps, when the circumstances so require, in order to fulfil their obligation to evaluate all relevant factors.[68]

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66. EC — HORMONES APPELLATE BODY REPORT, *supra* n.64, at para. 117, with reference to previous panel reports.

67. ARGENTINA — SAFEGUARD MEASURES ON IMPORTS OF FOOTWEAR, APPELLATE BODY REPORT, WT/DS121/AB/R (Dec. 14, 1999), at para. 121.

68. UNITED STATES — DEFINITIVE SAFEGUARD MEASURES ON IMPORTS OF WHEAT GLUTEN FROM THE EUROPEAN COMMUNITIES, APPELLATE BODY REPORT, WT/DS166/AB/R

The most precise description of the standard of the review of determinations made by national authorities in safeguard proceedings is found in the Appellate Body Report in *United States — Lamb Meat*. The starting point is the following statement:

> First, a panel must review whether competent authorities have evaluated *all relevant factors*, and, second, a panel must review whether the authorities have provided a *reasoned and adequate explanation* of how the facts support their determination. Thus, the panel's objective assessment involves a *formal* aspect and a *substantive* aspect. The formal aspect is whether the competent authorities have evaluated "all relevant factors." The substantive aspect is whether the competent authorities have given a reasoned *and* adequate explanation for their determination.

The Report, however, continues:

> We wish to emphasize that, although panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that panels must simply *accept* the conclusions of the competent authorities. To the contrary, . . . a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation, in depth, and in light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation.[69]

The most recent Appellate Body Report about the standard of review under Article 11 of the DSU relates to a special safeguard measure imposed under the Agreement on Textiles and Clothing. In this Report, the Appellate Body begins by stating: "[i]n describing the duties of competent authorities, we simulta-

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(Dec. 22, 2000), at para. 55 [hereinafter UNITED STATES — WHEAT GLUTEN APPELLATE BODY REPORT].

69. UNITED STATES — SAFEGUARD MEASURES ON IMPORTS OF FRESH, CHILLED OR FROZEN LAMB MEAT FROM NEW ZEALAND AND AUSTRALIA, APPELLATE BODY REPORT, WT/DS177 and WT/DS178 (May 1, 2001), at paras. 103 and 106.

neously define the duties of panels in reviewing the investigations and determinations carried out by competent authorities."[70] The Appellate Body further reasons:

> In our view, a *panel* reviewing the due diligence exercised by a Member in making its determination under Article 6 of the *ATC* has to put itself in the place of that Member at the time it makes its determination. Consequently, a panel must not consider evidence which did not exist *at that point in time.* A Member cannot, of course, be faulted for not having taken into account what it could not have known when making its determination.[71]

It should be repeated that this standard defines the investigation duties of the competent national authorities. As regards the broader question of whether a Member is entitled to adopt or maintain the safeguard measure, the Appellate Body added that it may well be that this right lapses as soon as new evidence emerges, proving that the substantive legal conditions for taking safeguard action were never satisfied.[72]

In the absence of a divergent special provision, the standard of review set out for panels in Article 11 of the DSU also applies to the review of actions taken by national authorities or courts in the area of competition – to the extent that these actions (or inactions) are covered by existing WTO law. The clarifications derived from the Agreement on Safeguards do not directly apply to individual decisions in the area of competition. They do, however, correspond to the internal logic of investigations in this area and are therefore suitable for an application by analogy. They also show the close link between investigation obligations specified for national authorities or courts and the standard of review prescribed for panels, the observance of which has to be reviewed by the Appellate Body. This link rests upon the fact that national authorities must make a determination on the substantive conditions on which the right to adopt a trade remedy depends (injury, causation, etc.), and the fact that panels must examine whether national authorities complied with their duties. Panels must therefore review all the elements

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70. UNITED STATES — TRANSITIONAL SAFEGUARD MEASURE ON COMBED COTTON YARN FROM PAKISTAN, APPELLATE BODY REPORT, WT/DS192 (Oct. 8, 2001), at para. 73.

71. *Id.* at para. 78.

72. *Id.* at para. 81.

that national authorities must consider.[73] This link should not be overlooked in the negotiations on a WTO competition agreement.

C. *The Special Standard of Review in Article 17.6 of the Anti-Dumping Agreement*

As mentioned above, only one of the WTO agreements sets out a special standard of review that departs from Article 11 of the DSU — the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade[74] ("Anti-Dumping Agreement"). Article 17.6 of the Anti-Dumping Agreement provides:

> (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
> (ii) the panel shall interpret the relevant provision of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.[75]

This special provision has been negotiated due to pressure from the United States and is meant to give Members a greater margin of maneuver than Article 11 of the DSU when they apply the Anti-Dumping Agreement. In the academic literature, it has been suggested that the margin given by Article 17.6(i) should

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73. The reverse is not necessarily the case — i.e., one cannot say with certainty that panels must never consider elements that national authorities, consistently with WTO law, did not consider. In other words, it is not excluded that there are elements that a panel must review, although they do not affect the legality of the national *determination*, but do decide over whether the trade remedy measure is WTO consistent, namely whether all the *substantive* conditions for taking a trade remedy are truly satisfied. *See e.g.*, *supra* n.72 and accompanying text.

74. Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping), April 15, 1994 WTO Agreement, Annex 1A [hereinafter Anti-Dumping Agreement].

75. *Id.* art. 17.6.

also be allowed within a competition agreement to be negotiated within the WTO.[76] However, according to the findings of the Appellate Body, Article 17.6(i) ultimately does not differ from Article 11 of the DSU with regard to the standard applying to the assessment of facts. In *United States — Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, the Appellate Body states:

> Article 17.6(i) requires panels to make an "*assessment of the facts.*" The language of this phrase reflects closely the obligation imposed on panels under Article 11 of the DSU to make an "*objective assessment of the facts.*" Thus the text of both provisions requires panels to "assess" the facts and this, in our view, clearly necessitates an active review or examination of the pertinent facts. Article 17.6(i) of the *Anti-Dumping Agreement* does not expressly state that panels are obliged to make an assessment of the facts which is "*objective.*" However, it is inconceivable that Article 17.6(i) should require anything other than that panels make an *objective* "assessment of the facts of the matter." In this respect, we see no "conflict" between Article 17.6(i) of the *Anti-Dumping Agreement* and Article 11 of the DSU.[77]

To the extent that these Appellate Body findings do not cover the issue of *evaluating* facts, it remains possible that Article 17.6(i), by requiring no more than that this evaluation be "unbiased and objective", respects a certain margin of appreciation of national authorities that is not subject to review.

To our knowledge, no one so far recommended using the special (legal) standard of review of Article 17.6(ii) of the Anti-Dumping Agreement for a future competition agreement. It may be argued that, as opposed to the preceding section (i), section (ii) indeed provides for a departure from the general standard of review applicable under Article 11 of the DSU. This departure, however, is limited to the interpretation of the provisions of the Anti-Dumping Agreement. For that reason, its

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76. Maria-Chiara Malaguti, *Restrictive Business Practices in International Trade and the Role of the World Trade Organization*, 32(3) J. WORLD TRADE 117, 145 (1998).

77. UNITED STATES — HOT-ROLLED STEEL APPELLATE BODY REPORT, *supra* n.37, at para. 55. In paragraph 56, this Report gives a revealing example for the conclusions that can be drawn from the panel's standard of review about the scope of investigation obligations of national authorities. The Report confirms that there is a close interrelation between the definition of the national authorities' investigation obligations and the panels' standard of review.

application should similarly be limited to the interpretation of the provisions of a future WTO competition agreement if it is to be included in that agreement. In contrast to the detailed and precise provisions of the Anti-Dumping Agreement, the rules of a future WTO competition agreement will presumably be formulated in a much more general and open manner. From the very beginning, they will therefore accord a greater margin of maneuver to Members. Consequently, there will be less need for a provision such as Article 17.6(ii).[78] Further, as regards the question of the extent to which Article 17.6(ii) provides for a departure from the general standard of *legal* review, one must first ask whether the application of the rules of treaty interpretation can really result in more than one permissible interpretation.[79] If this is the case, the next question would be to what extent Article 17.6(ii) produces different outcomes than the generally applicable principle of interpretation of public international law "*in dubio mitius*."

In summary, it must be acknowledged that competition laws and individual decisions in the field of competition law are to be reviewed – to the extent that they fall under existing WTO obligations – in accordance with the standard of review set out in Article 11 of the DSU. This standard, when applied to the obligations of national authorities under the agreements on trade remedies, excludes *de novo* review. It does, however, specify relatively demanding requirements with regard to the duties of investigation and justification of competent national authorities or courts, provided that one agrees with the proposition that the

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78. As regards the interpretation of Article 17.6(ii), *see id.* at paras. 57-62.

79. One should not be excessively skeptical about such a possibility. In many legal orders, there are principles of interpretation requiring that laws be interpreted, wherever possible, in accordance with superior law (e.g. Constitutional or European law) or international law. In practice, these principles of interpretation are far from being inoperative.

In *United States — Hot-Rolled Steel*, the Appellate Body did not have to address this question. It only assessed whether the approach taken by the domestic authority rested upon an interpretation that is "permissible" following application of the rules of treaty interpretation. UNITED STATES — HOT-ROLLED STEEL APPELLATE BODY REPORT, *supra* n.37, at para. 172. In other words, it was only decided, as only needed to be decided, that the interpretation chosen by the national authority was not (one of) the correct one(s). *See also* EUROPEAN COMMUNITIES – ANTI-DUMPING DUTIES ON IMPORTS OF COTTON-TYPE BED LINEN FROM INDIA, APPELLATE BODY REPORT, WT/DS141/AB/R (Mar. 1, 2001), at paras. 63-65.

described jurisprudence on Article 11 of the DSU should be transferred to the area of competition.

IX. *FACT-FINDING: A WEAK SPOT IN THE WTO DISPUTE SETTLEMENT SYSTEM*

A. *General Remarks*

By nature, decisions in the area of competition are fact intensive. They share this attribute with other areas of economic law and therefore, as stated above, do not differ fundamentally from investigations regarding safeguards and anti-dumping or countervailing duties. The relevance of fact-finding to disputes related to competition was recognized early on: in 1958, a GATT expert group assessed the question of whether Article XXIII of the GATT 1947 should be applied to restrictive business practices. The majority of this group was against such an application, among other reasons, because of "the complexities of the subject" and "the impossibility of obtaining accurate and complete information on private commercial activities in international trade without . . . adequate powers of investigation."[80] This section will thus examine whether the investigation powers offered by the current dispute settlement system are adequate.

In the WTO dispute settlement system, fact-finding is one of the tasks of panels. The Appellate Body's action is limited to a review of legal questions.[81]

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80. GATT, REPORT ON RESTRICTIVE BUSINESS PRACTICES, L/1015, B.I.S.D. 95/170 (June 2, 1960). B.I.S.D. 9S/176. The minority expressed itself in favor of the possibility to use Article XXIII of the GATT when a contracting party can show nullification or impairment caused by a restrictive business practice.

81. *See* DSU, *supra* n.47, art. 17.6(ii) ("An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."). As is well known, the distinction between legal and factual questions is difficult. The legal qualification of facts is certainly one of the legal questions the Appellate Body can review. *See* EC — HORMONES APPELLATE BODY REPORT, *supra* n.64, at para. 132: "The consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is, however, a legal characterization issue. It is a legal question."

The verification of a panel's compliance with Article 11 of the DSU in establishing facts is also one of the legal questions the Appellate Body can review. In paragraph 133 of the EC – HORMONES APPELLATE BODY REPORT, the Appellate Body describes examples of breaches of Article 11 of the DSU:

> The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts. The willful distortion or misrepresentation of the evidence put before a panel is similarly inconsistent with an objective assessment of the

B. *The Right of Panels to Seek Information*

Article 13 of the DSU entitles panels to seek information in order to establish the facts necessary to adjudicate a dispute. Article 13 provides:

> 1. Each Panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. However, before a panel seeks such information or advice from any individual or body within the jurisdiction of a Member it shall inform the authorities of that Member. A Member should respond promptly and fully to any request by a panel for such information as the panel considers necessary and appropriate. Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.
> 2. Panels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter. . . .

The right to seek information, which Article 13 of the DSU gives to every panel is broad and comprehensive.[82] In its Report in *Canada – Measures Affecting the Export of Civilian Aircraft*, the Appellate Body stated:

> It is clear form the language of Article 13 that the discretionary authority of a panel may be exercised to request and obtain information, not just "from any individual or body" within the jurisdiction of a Member of the WTO, but also from *any Member*, including *a fortiori* a Member who is a party to a dispute before a panel. . . . It is equally important to stress that this discretionary authority to seek and obtain information is *not* made conditional . . . upon the other party to the dispute having previously established, on a *prima facie* basis, such other party's claim or defense. Indeed, Article 13.1 imposes *no conditions* on the exercise of this discretionary au-

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facts. "Disregard" and "distortion" and "misrepresentation" of the evidence, in their ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an egregious error that calls into question the good faith of a panel.

Id. This illustration does not exhaust the universe of possible legal errors committed in the establishment of facts. A logical mistake made in the best faith in the establishment of facts, for instance, will have to be qualified as a legal mistake.

82. UNITED STATES — IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS, APPELLATE BODY REPORT, WT/DS58/AB/R (Oct. 12, 1998), at paras. 104 and 106.

thority.[83]

Despite the extensive right to seek information of every panel, it is generally believed that the investigation of facts is among the weakest spots of the panel procedure.

C. *The Duty of Members to Surrender Information*

Only seemingly, a first weak spot seems to arise from the very wording of Article 13.1 of the DSU, given that the third sentence expresses the Members' duty to respond to a panel's request for information through the word "should" rather than "shall." "Should" seems to indicate a "*nobile officium*" and not a legal obligation. In the already mentioned Report in *Canada – Measures Affecting the Export of Civilian Aircraft*, the Appellate Body however found that Article 13.1 imposes an obligation on Members to cooperate and to surrender information:

> 188. If Members that were requested by a panel to provide information had no legal duty to 'respond' by providing such information, that panel's undoubted legal '*right* to seek' information . . . would be rendered meaningless. A Member party to a dispute could, at will, thwart the panel's fact-finding powers and take control itself of the information-gathering process that Articles 12 and 13 of the DSU place in the hands of the panel. A Member could, in other words, prevent a panel from carrying out its task of finding the facts constituting the dispute before it and, inevitably, from going forward with the legal characterization of those facts.
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> 189. The chain of potential consequences does not stop there. To hold that a Member party to a dispute is not legally bound to comply with a panel's request for information relating to that dispute, is, in effect, to declare that Member legally free to preclude a panel from carrying out its mandate and responsibility under the DSU. So to rule would be to reduce to an illusion and a vanity the fundamental right of Members to have disputes arising between them resolved through the system and proceeding for which they bargained in concluding the DSU.[84]

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83. CANADA — MEASURES AFFECTING THE EXPORT OF CIVILIAN AIRCRAFT, APPELLATE BODY REPORT WT/DS70/AB/R (Aug. 2, 1999), at para. 185 [hereinafter CANADA — AIRCRAFT APPELLATE BODY REPORT].

84. *Id.* at paras. 188-89 (footnote omitted). The interpretation of the word "should" in Article 13 of the DSU is one of the very few cases in which the Appellate

D. *The Right of Panels to Draw Negative Inferences*

A Member can violate its information obligation under Article 13 of the DSU (as happened in *Canada – Measures Affecting the Export of Civilian Aircrafts*). In that case, the panel may draw negative inferences from the attitude of the non-cooperating Member. The Appellate Body derived this right — the use of which is left to the discretion of the panel[85] — from the normal function of panels as confirmed by Annex V of the Agreement on Subsidies and Countervailing Duties.[86] Annex V contains rules about the gathering of information on "serious prejudice" in the case of "actionable" subsidies. Paragraphs 6 and 7 of this Annex state:

> 6. . . . Where information is unavailable due to non-cooperation by the subsidizing and/or third country Member, the panel may complete the record as necessary relying on best information otherwise available.
> 7. In making its determination, the panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process.[87]

The right to draw negative inferences from the behavior of the non-cooperating Member is not limited to the Agreement on Subsidies and Countervailing Duties. In the *Wheat Gluten* dispute, the Appellate Body did not hesitate to apply it also to the Agreement on Safeguards. However, also in this case, the Appellate Body came to the conclusion that the panel did not overstep the boundaries of its discretion by refraining from drawing negative inferences.[88]

The general obligation of Members to share information and the right of panels to draw negative inferences may lead some to believe that complaints about the weaknesses in the in-

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Body goes beyond the ordinary meaning of the text and bases its interpretation clearly on the object and purpose of the provision at issue.

85. *See infra* nn.104-106 and accompanying text.

86. CANADA — AIRCRAFT APPELLATE BODY REPORT, *supra* n.83, at paras. 198–203.

87. The Anti-Dumping Agreement, *supra* n.74, contains a similar provision; however, it only applies to national authorities. *See* Article 6.8, which allows determinations to be made "on the basis of the facts available," and paragraph 7 of Annex II, which adds: "[i]t is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favorable to the party than if the party did cooperate."

88. UNITED STATES — WHEAT GLUTEN APPELLATE BODY REPORT, *supra* n.68, at paras. 170–76.

vestigation of facts are either unfounded or that the panels and Members are to blame for these weaknesses. One should, however, not rush to such a conclusion. It is very possible that, by nature, the panel procedure is marked by weaknesses. Before we deal with the panels, however, it is necessary to mention two weak spots, of which the first would be relatively easy to overcome, and the second, in contrast, will be overcome only with difficulty.

E. *The Absence of Standard Rules of Procedure for Panel Proceedings*

Immediately after the nomination of its Members, the Appellate Body adopted its own procedural rules. The rules were adopted pursuant to Article 17.9 of the DSU, which provides: "working procedures shall be drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General, and communicated to the Members for their information.[89] For panel proceedings, such procedural rules do not exist so far. Article 12.1 of the DSU mandates that panels use the Working Procedures set out in Appendix 3 to the DSU, but these rules are extremely rudimentary. Article 12.1 authorizes panels to adopt additional or different rules after consulting with the parties. A comprehensive set of standard working procedures to be applied by every panel after consulting the parties, however, still does not exist. In a number of its Reports, the Appellate Body pointed out that the existence of such standard working procedures would be desirable.[90] One must also recognize that standard working procedures for panel proceedings chiefly serve the purpose of ensuring due process and procedural fairness

89. From the perspective of the EU/EC observer, Article 17.9 of the DSU is surprising to the extent that the Statute of the European Court of Justice is laid down in a Protocol which is part of the EC Treaty and which, only in some part, can be amended by the Council, acting unanimously at the request of the Court of Justice or the Commission. *See* Article 245 of the EC Treaty. The Court of Justice adopts its own Rules of Procedure which, however, require the approval of the Council. The requirement used to be that of a unanimous approval. *See* Article 245(3) of the EC Treaty in the version of the Treaty of Amsterdam. The Treaty of Nice replaced the unanimity requirement with qualified majority voting. *See* Article 223(6) of the new version of the EC Treaty.

90. ARGENTINA — MEASURES AFFECTING IMPORTS OF FOOTWEAR, TEXTILES, APPAREL AND OTHER ITEMS, APPELLATE BODY REPORT, WT/DS56/AB/R and Corr.1 (Apr. 22, 1998), at para. 79, n.68, with reference to EC – BANANAS III APPELLATE BODY REPORT, *supra* n.27, at para. 44, and INDIA — PATENT PROTECTION FOR PHARMACEUTICAL AND AGRICULTURAL CHEMICAL PRODUCTS, APPELLATE BODY REPORT, WT/DS50/AB/R (Dec. 19, 1997), at para. 95.

(the former includes the latter). They would only contribute to the investigation of facts if it were possible to solve the structural problem of the surrender of confidential information, especially the problem of access to commercial secrets.

F. *The Problem of Confidential Information*

Everyone who has dealt with competition law or anti-dumping law is familiar with the structural problem of confidential information. On the one hand, there is the interest in ensuring an optimal clarification of the facts, which militates in favor of using confidential information. On the other hand, principles of due process and procedural fairness require that the principle of equality between the parties be respected. It is therefore necessary to make confidential information that one party uses available to the other party. How can this fundamental procedural right be reconciled with the legitimate interest in protecting the confidentiality, an interest that is particularly relevant with regard to commercial secrets? Where that conflict between the establishment of the truth and the protection of business confidential information cannot be reconciled, the protection of business confidential information prevails — at least in the jurisprudence of the European Court of Justice: the Commission is not entitled to use business confidential information if due process cannot be guaranteed.[91]

All the WTO agreements that are relevant in the present context require that confidential information be treated as such. For instance, the Anti-Dumping Agreement regulates the protection of confidentiality in particular detail. Article 6.5 provides: "any information which is by nature confidential . . . or which is provided on a confidential basis by parties to an investigation shall . . . be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it."[92] In order to solve the problems related to due process, Article 6.5, first subparagraph, provides for an obligation to furnish a non-confidential summary. This rule, however,

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91. It should, however, be noted that rules about the use of confidential information in such a case affect the relationship between a "prosecuting" public authority and a private person. It is not necessarily obvious that it is justified to apply the same restrictions in the legal relationship (and dispute) between two equal parties (such as States).

92. Anti-Dumping Agreement, *supra* n.74, art. 6.5.

also recognizes that it may exceptionally not be possible to give such a summary:

> The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.[93]

It is true that the Anti-Dumping Agreement attempts to live up to the principle of due process. Article 6.2 requires that "throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests."[94] Article 6.9 states: "The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures."[95]

Ultimately, however, the tension between the establishment of the truth and the protection of confidentiality remains unresolved. This is apparent from Article 12.2.2, which provides in a Solomon-like way:

> A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain . . . all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures on the acceptance of a price undertaking, due regard being paid to the requirement for the protection of confidential information.[96]

In *Thailand — Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steal and H-Beams from Poland*, the panel undertook the bold attempt of deriving from Article 3.1[97] in con-

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93. Anti-Dumping Agreement, *supra* n.74, art. 6.5.1.

94. Anti-Dumping Agreement, *supra* n.74, art. 6.2.

95. Anti-Dumping Agreement, *supra* n.74, art. 6.9.

96. Anti-Dumping Agreement, *supra* n.74, art. 12.2.2A.

97. Anti-Dumping Agreement, *supra* n.74, art. 13.1. Article 3.1 states: "A determination of injury for the purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination." *Id.*

junction with the already mentioned Article 17.6 of the Anti-Dumping Agreement that it is prohibited to rely on confidential considerations for the determination of the definitive anti-dumping duty that have not been made available to the parties. This attempt, which was understandable from the perspective of due process, has been thwarted by the Appellate Body. In the opinion of the Appellate Body, Article 3.1 does not prevent the competent national authority from relying on confidential information. Such a prohibition of relying on confidential and therefore inaccessible information can also not be derived from the above-mentioned standard of review stipulated by Article 17.6:

> Whether evidence or reasoning is disclosed or made discernible to interested parties by the final determination is a matter of *procedure* and *due process*. These matters are very important, but they are comprehensively dealt with in other provisions, notably Articles 6 and 12 of the *Anti-Dumping Agreement*. Articles 17.5 and 17.6(i) require a panel to examine the facts made available to the investigating authority of the importing Member. These provisions do not prevent a panel from examining facts that were not disclosed to, or discernible by, the interested parties at the time of the final determination.[98]

In Articles 12.2, 12.3, 12.4 and 12.8, the Agreement on Subsidies and Countervailing Measures contains partially identical, partially similar provisions. The Agreement on Safeguards is less detailed, but also guarantees the protection of confidential information.[99] *Mutatis mutandis*, the conclusions of the Appellate Body in *Thailand — Anti-Dumping Duties on Angles, Shapes and*

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98. THAILAND — ANTI-DUMPING DUTIES ON ANGLES, SHAPES AND SECTIONS OF IRON OR NON-ALLOY STEEL AND H-BEAMS FROM POLAND, APPELLATE BODY REPORT, WT/DS122/AB/R (Apr. 5, 2001), at paras 117-18.

99. The pertinent Article 3.2 of the Agreement on Safeguards provides:

> Any information which is by nature confidential or which is provided on a confidential basis shall, be treated as such by the competent authorities. Such information shall not be disclosed without permission of the party submitting it. Parties providing confidential information may be requested to furnish non-confidential summaries thereof or, if such parties indicate that such information cannot be summarized, the reasons why a summary cannot be provided. However, if the competent authorities find that a request for confidentiality is not warranted and if the party concerned is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.

Id.

Sections of Iron or Non-Alloy Steel and H-Beams may probably also be applied to these two agreements.

The protection of confidential information is not limited to investigations before national authorities, but extends to panel proceedings. The already mentioned Article 13 of the DSU, the rule giving panels their comprehensive right to seek information, also stipulates: "Confidential information which is provided shall not be revealed without formal authorization from the individual, body or authorities of the member providing the information."[100]

Consequently, the conflict between the clarification of the facts, the protection of confidential information and the principle of due process also arises at the level of WTO dispute settlement. None of the existing procedural rules resolves this conflict in either way. Individual panels tried to defuse it by adopting *ad hoc* procedural rules. In the relationship between the United States and the European Communities, all these attempts failed. The European Communities systematically rejected the proposed procedural rules because they believed that these rules would have made the confidential information available to an excessively small number of people without there being any legal basis in the DSU. They took the position that the confidentiality obligations of their officials provided for sufficient guarantees and that the proposed procedural rules put into question the inviolability of their Geneva Mission (under public international law).[101] The United States then refused to make confidential information available. Communicating it only to the panel was not possible due to the prohibition of *ex parte* communications.[102]

A fall back option for a panel, where no procedural rules for the protection of confidential information can be adopted, is to

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100. DSU, *supra* n.47, art. 13.

101. Decision by the Arbitators, *EC — Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/ARB (Apr. 6, 1999), at paras. 2.4-2.5. The immunity argument stems from the fact that the proposed procedural rules would have required the party receiving confidential information to permit the providing party to inspect the safe in its Mission. *See* CANADA — AIRCRAFT APPELLATE BODY REPORT, *supra* n.83, at paras. 133-36, also for further arguments put forward by the European Communities. It is noteworthy that the European Communities added that the problems posed by confidential information should be resolved through an amendment to the DSU. *Id.*

102. Article 18.1 of the DSU provides: "There shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body." *Id.*

convince parties to submit information that is aggregated, indexed and/or partly blackened. Such information can be useful to show the development of individual factors over a set period of time, without exposing firm-specific details. This fall back option, however, is not a sufficient solution in each and every case.

Even if a panel adopts *ad hoc* procedural rules for the communication of confidential information, this is not yet any guarantee that a party will actually make such information available. This is apparent from the already mentioned case *Canada – Measures Affecting the Export of Civilian Aircraft*, in which Canada refused to communicate confidential information although the *ad hoc* procedural rules that the panel had adopted essentially corresponded to those proposed by Canada itself.[103] Without the cooperation of the parties, the currently practised procedure for sharing and protecting information does not work.

In such a case, it may well be appropriate and even indicated that a panel draw negative inferences from the behavior of the non-cooperating party.[104] Drawing negative inferences, however, is a step that demands quite a bit of courage from panelists who have been selected for an individual case.[105] In addition, negative inferences are not always the appropriate answer. For instance, they do not seem justified where a panel does not succeed in adopting *ad hoc* procedures for the communication of confidential information. In contrast, where the refusal to transmit confidential information appears to be unjustified or even ill-minded, a panel should, in discharging its fact-finding duty, take this into account as an element weighing against the party concerned. The weight to be attributed to this element is the panel's decision and obviously depends on all the other factual elements before that panel.[106] In making this decision, the panel as the sole trier of facts enjoys a degree of "discretion" – not in the sense that a certain decision is as correct as the opposite decision, but in the sense of an appellate review that is limited to compliance with *legal* standards.

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103. CANADA — AIRCRAFT APPELLATE BODY REPORT, *supra* n.83, at para. 195.

104. It is not a surprise that the admissibility of negative inferences has been established in CANADA – AIRCRAFT APPELLATE BODY REPORT, *supra* n.83. *See supra* n.86 and accompanying text.

105. On structural weaknesses of the panel system, *see infra* Section IX.G.

106. *See also* UNITED STATES — WHEAT GLUTEN APPELLATE BODY REPORT, *supra* n.68 at para. 174.

The Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Duties expressly provide that in certain situations the competent national authority may make a decision on the basis of "available information." Article 6.8 of the Anti-Dumping Agreement provides:

> In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.[107]

Appendix V to the Agreement on Subsidies and Countervailing Duties contains a similar paragraph 8 which stipulates:

> If the subsidizing and/or third-country Member fail to cooperate in the information-gathering process, the complaining Member will present its case of serious prejudice, based on evidence available to it, together with facts and circumstances of the non-cooperation of the subsidizing and/or third-country Member. Where information is unavailable due to non-cooperation by the subsidizing and/or third country Member, the panel may complete the record as necessary relying on best information otherwise available.[108]

The quoted rules of the Anti-Dumping Agreement and the Agreement on Subsidies and Countervailing Duties practically allow national authorities to do the same as panels under the principle of negative inferences. One could think about generalizing these rules and about extending them to all cases of refused transmission of confidential information. As long as the resort to such rules remains the decision[109] of the body to which the confidential information has not been made available, there is

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107. Anti-Dumping Agreement, *supra* n.74, art. 6.8. On the interpretation and application of Article 6.8 and of Annex II of the Anti-Dumping Agreement, *see* UNITED STATES — HOT-ROLLED STEEL APPELLATE BODY REPORT, *supra* n.37, at paras. 77–110.

108. Agreement on Subsidies and Countervailing Duties, Apr. 15, 1994, WTO Agreement, Annex 1A.

109. The term "decision", rather than "discretion", has been used intentionally. For the reasons indicated in this Article, the word "discretion" is problematic. It may suggest that there are no criteria guiding the decision as to when, in the establishment of facts, negative inferences are to be drawn and when they are not to be drawn. In other words, the word "discretion" may suggest that the decision not to draw these negative inferences is equally correct as the decision to do so.

no fundamental objection against this generalization and extension. Any additional step, however, would be as questionable as a systematic and automatic resort to negative inferences that would set aside the other factual elements before the panel. The problem of confidential information can, therefore, not be solved alone through the instrument of negative inferences or the decision on the basis of best information available.

Decisions in the area of competition by nature are not only fact intensive. They also require knowledge and evaluation of confidential information. In competition law, confidential information is even more important than in the areas covered by the Agreement on Safeguards, the Anti-Dumping Agreement, and the Agreement on Subsidies and Countervailing Duties.

The problem of the treatment of confidential information has correctly been labeled a "serious systemic issue."[110] Its resolution is urgent. We believe that, in the long run, the WTO dispute settlement system can only be applied satisfactorily to the three mentioned areas, if the conflict between clarification of facts, protection of confidentiality, and the principle of due process can be resolved in a sound manner.

For a future WTO competition agreement, the solution of the tension between the establishment of the truth, protection of confidential information and procedural fairness is even more important. We believe this dilemma to be the most significant obstacle that must be overcome on the way to a satisfactory arrangement for the settlement of disputes in individual competition cases.

In addition to the quasi-judicial settlement of disputes by panels and the Appellate Body, the WTO agreements normally provide for discussions in special Committees that are responsible for the application and supervision of the implementation of the respective agreements by the Members. The Committees for the Agreements on Anti-Dumping, Subsidies and Safeguards may serve as examples.[111] A future competition agreement should establish a similar committee for questions related to

110. UNITED STATES — WHEAT GLUTEN APPELLATE BODY REPORT, *supra* n.68, at para. 170.

111. *See* Anti-Dumping Agreement, art. 16 (establishing the Committee on Anti-Dumping Practices); Agreement on Subsidies and Countervailing Measures, art. 24 (establishing the Committee on Subsidies and Countervailing Measures); Agreement on Safeguards, art. 13 (establishing the Committee on Safeguards).

competition. A sort of peer review of individual decisions in the area of competition would be highly desirable. According to some of the current proposals, a peer review mechanism is to play an important role in a future WTO competition agreement, to some extent, as an alternative to dispute settlement.[112] The absence of a satisfactory solution to the problem of confidential information would, however, also stand in the way of such a peer review, given that a competent peer review depends on the knowledge of all relevant facts on which the scrutinized decision has been based. It can be presumed that the agreement on a procedure for the protection of confidential information raises at least as important problems for a system of peer review, as it does for the quasi-judicial dispute settlement system.[113]

G. *The Problem of the Panel Structure*

The Appellate Body is a permanent institution.[114] It is composed of seven Members who are appointed for a term of four years (with the possibility of one reappointment for another four years). In contrast, panels are established *ad hoc* for each dispute.[115] Also, the members of every panel are selected and appointed *ad hoc* on the basis of a broad range of criteria.[116] The WTO Secretariat maintains an indicative list of potential panelists from which panel members can be selected.[117] This list, however, is not exhaustive, which means that persons who are not on the list equally can be and often are appointed as panel members.

Panel members are independent. Article 8.2 of the DSU requires explicitly that panel members should be selected with a view to ensuring their independence. For the same reasons, Article 8.3 of the DSU excludes citizens of Members whose governments are parties or third parties in the dispute from serving as

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112. WTO, REPORT (2001) OF THE WORKING GROUP ON THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY TO THE GENERAL COUNCIL, *supra* n.21, at paras. 88-90.

113. This presumption of "at least" equivalent problems relies on the fact that the information transmitted to a committee responsible for this peer review would become available to officials of as many as (currently) 146 Members (plus perhaps observers) as compared to the much lower number of officials of the (few) Members involved in a dispute that is already generally governed by rules of confidentiality.

114. *See* DSU, *supra* n.47, art. 17, which refers to the "standing Appellate Body."

115. DSU, *supra* n.47, art. 6.

116. DSU, *supra* n.47, arts. 8.1-8.3.

117. DSU, *supra* n.47, art. 8.4.

panelists, unless the parties to the dispute agree otherwise. Panel members are generally highly qualified persons. Many exercise this function only once, whereas others are re-appointed. While there is no doubt about the personal independence of panel members, the rules of the WTO dispute settlement system do little to guarantee this independence in an institutional sense. There are only some safeguards based on the obligations contained in the Rules of Conduct. Because serving on a panel is an honor and a personal distinction, it is not surprising if a panel member is interested in being appointed for another panel in the future.

In contrast to the Appellate Body Members who are appointed for several years, one cannot expect that the *ad hoc* appointed panel members will act as resolutely as the members of a permanent institution with regard to the outlined problems of fact finding. This is particularly true of the problems related to confidential information and negative inferences.

An additional facet of the weak institutional independence of panelists arises from the main profession of the individuals concerned. Many panelists are Geneva-based diplomats or capital-based trade officials. Outside of the dispute, they may often deal with the diplomats or officials of the parties to the dispute on other trade matters. The very people participating in the oral hearing of the panel, i.e., the representatives of the parties *and* panelists, may find themselves around the negotiating table the next day.[118]

The case for modifying the structure of panels and for guaranteeing the independence of panel members in an institutional manner has previously been made.[119] Two means appear to be available to achieve that objective. One possibility and proposal in the current DSU reform negotiations[120] is the establishment of a permanent panel body with fixed membership, which could include the creation of chambers for different subject-matters

118. The admittedly caricatured analogy would be that of a national judiciary without a professional body of judges, in which the attorneys, who all know each other, would take turns sitting on the bench.

119. *See Contribution of the European Communities and its Member States to the Improvement of the WTO Dispute Settlement Understanding*, Communication from the European Communities to the Special Session of the DSB, TN/DS/W/1, Mar. 13, 2002, at 2. The proposal has received support from several other Members.

120. *Id.*

(agreements). This solution would probably increase the administrative cost of panel proceedings, and concerns in that regard have accordingly been expressed in the negotiations.[121] A different, less radical possibility would be the establishment of a closed list of potential panel members. Such a list would also have to be of limited length. There are, of course, possible combinations of the mentioned suggestions: for instance, the panel chairman could be part of a standing panel body and the other members could be drawn from a list or selected according to the specific expertise required.

Reforming the panel structure would significantly enhance the institutional independence of panelists. If the Members of the WTO wish to move in that direction, the panel structure would have to receive priority in the current negotiations on the revision of the DSU, which resumed after the Doha Ministerial Conference.[122] If the WTO dispute settlement system were to be extended to a new competition agreement, the reform would become even more important than it already is now.

X. *THE NON-VIOLATION COMPLAINT*

This Article has so far focused on the most common form of complaint under the WTO dispute settlement system, the so-called violation complaint. The Article would, however, be incomplete if it did not briefly mention the already introduced, much less frequent non-violation complaint. A successful GATT complaint depends on the nullification or impairment of benefits accruing to a Member directly or indirectly under one of the agreements, or the impediment of the attainment of any objective of an agreement. According to Article XXIII:1(b) of the GATT 1994, this condition can also be satisfied by the application by another Member of any measure that does not conflict with the agreement in question.

The most important non-violation complaint from a competition perspective has been the one about the importation and sale in Japan of photo films and paper originating in the United States. The panel report in this dispute, which is commonly

121. *See e.g.*, *India's Questions to the European Communities and its Member States on their Proposal Relating to Improvements of the DSU*, Communication from India to the Special Session of the DSB, TN/DS/W/5, May 7, 2002, at 3.

122. *See supra* n.3.

known as the *Kodak/Fuji* case, takes note of the low number of non-violation complaints that have been raised and examined in earlier disputes (at that time, the total number was eight). By quoting a previous panel, the report explains the purpose of Article XXIII:1(b) of the GATT 1994:

> The idea underlying the provisions of Article XXIII:1(b) is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement.[123]

The panel in *Kodak/Fuji* draws the following conclusion:

> This suggests that both the GATT contracting parties and WTO Members have approached this remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement. . . . The reason for this caution is straightforward. Members negotiate the rules that they agree to follow and only exceptionally would expect to be challenged for actions not in contravention of those rules.[124]

The only Appellate Body Report on a non-violation complaint states that Article XXIII:1(b) of the GATT 1994 "should be approached with caution and should remain an exceptional remedy."[125]

In this vein, it has been suggested in the literature that the non-violation complaint should not be used as a remedy against restrictive business practices without prior normative guidance from the membership of the WTO.[126] This position is also based on the nature of the few successful non-violation complaints to

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123. EUROPEAN ECONOMIC COMMUNITY – PAYMENTS AND SUBSIDIES PAID TO PROCESSORS AND PRODUCERS OF OILSEEDS AND RELATED ANIMAL-FEED PROTEINS, PANEL REPORT, B.I.S.D. 37S/86 (Jan. 25, 1990), at para. 144.

124. JAPAN – FILM PANEL REPORT, *supra* n.23, at para. 10.37.

125. EUROPEAN COMMUNITIES — MEASURES AFFECTING ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS, APPELLATE BODY REPORT, WT/DS135/AB/R (Apr. 5, 2001), at para. 186. The quoted language was borrowed from JAPAN – FILM PANEL REPORT, *supra* n.23, at para. 10.37.

126. Roessler, *Should Principles of Competition Policy Be Incorporated Into WTO Law Through Non-Violation Complaints?*, *supra* n.52, at 420.

date,[127] which were either in line with the Contracting Parties' normative guidance,[128] or, today, would be treated as violation cases.[129] A final argument is the historic evolution from a consultation and negotiation forum to binding third-party adjudication which must not "add to or diminish the rights and obligations"[130] provided in the WTO Agreement.[131]

Non-violation complaints accordingly may appear not to be the intuitive remedy to be taken wherever restrictive business practices impede imports. Yet, the potential, and practically difficult,[132] role of the non-violation complaint in this field has not only been demonstrated by the *Kodak/Fuji* dispute, but has been recognized already quite early. The GATT expert group assessing restrictive business practices under Article XXIII of the GATT 1947 specifically dealt with the question of whether non-violation complaints against restrictive business practices should be possible.[133] There is no doubt that restrictive business practices can obstruct market access similarly to a governmental import restriction and they, therefore, can impede the value of a trade concession. Accordingly, Jagdish Bhagwati argued in 1994 that, through non-violation complaints, competition policy re-

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127. WORKING PARTY REPORT, THE AUSTRALIAN SUBSIDY ON AMMONIUM SULPHATE, B.I.S.D. II/188 (Apr. 3, 1950); TREATMENT BY GERMANY OF IMPORTS OF SARDINES, PANEL REPORT, B.I.S.D. 1S/53 (Oct. 31, 1952); EUROPEAN ECONOMIC COMMUNITY — FOLLOW-UP ON THE PANEL REPORT "PAYMENTS AND SUBSIDIES PAID TO PROCESSORS AND PRODUCERS OF OILSEEDS AND RELATED ANIMAL-FEED PROTEINS", PANEL REPORT, B.I.S.D. 39S/91 (Mar. 31, 1992).

128. The decision adopted by consensus in 1955 that a contracting party, having negotiated a tariff concession, may be assumed to have a reasonable expectation that the value of that concession will not subsequently be impaired by the introduction or increase of a subsidy. REPORT OF THE REVIEW WORKING PARTY ON "OTHER BARRIERS TO TRADE" in the 1954-55 Review Session, L/334 and Addendum, adopted on March 3, 1955, B.I.S.D. 3S/222, 224, at para. 13.

129. Roessler, *Should Principles of Competition Policy Be Incorporated into WTO Law Through Non-Violation Complaints?*, *supra* n.52, at 419.

130. DSU, *supra* n.47, art. 3.2.

131. Roessler, *Should Principles of Competition Policy Be Incorporated into WTO Law Through Non-Violation Complaints?*, *supra* n.52, at 420.

132. Anderson & Holmes, *supra* n.2, at 551.

133. B.I.S.D. 9S/170. We recall that the majority of this group was against such an application, among other reasons, because of "the complexities of the subject" and "the impossibility of obtaining accurate and complete information on private commercial activities in international trade without . . . adequate powers of investigation." *See supra* n.80 and accompanying text. In this Section, we will, in contrast, examine the question to what extent *de lege lata* non-violation complaints *are* possible.

lated questions could be brought before the GATT.[134] Finally, the above argument that dispute settlement must not "add to or diminish the rights and obligations" uner the WTO Agreement can easily be turned on its head: panels and the Appellate Body must not disregard what the non-violation complaint already covers.

A non-violation complaint is successful only if three cumulative conditions are satisfied: (1) the application of a measure by a Member; (2) the existence of a concession or an advantage resulting in a benefit accruing to another Member directly or indirectly under the agreement in question, and (3) the nullification or impairment of this benefit as a consequence of the measure of the other Member.[135]

Anti-competitive behavior of private actors without governmental link does not satisfy the first condition. Competition related norms — such as a formal competition act — certainly fall within the concept of a Member's measure. Whether the same is true about individual decisions in the area of competition will probably be the object of different views. Text and purpose of Article XXIII:1(b) of the GATT 1994 militate in favor of a broad interpretation of the concept "measure."[136] It would be more difficult to qualify inaction of a competition authority as a measure. Complete inaction is not the application of a measure,[137] but a measure might be seen in a positive decision not to intervene in a particular case of anti-competitive private behavior,[138] in an abrogation of a piece of competition legislation, in an exemption and in the combination of instances of intervention and of non-intervention. The limits imposed on the application of Article XXIII:1(b) of the GATT 1994, therefore, seem to be similar to those relevant for Article XXIII:1(a) combined with Article III:4 of the GATT 1994. In other words, the non-violation

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134. Quoted in Roessler, *Should Principles of Competition Policy Be Incorporated into WTO Law Through Non-Violation Complaints?*, *supra* n.52, at 414.

135. JAPAN — FILM PANEL REPORT, *supra* n.23, at para. 10.41.

136. *Id.* at paras. 10.42–10.60.

137. Petros C. Mavroidis & Sally J. Van Siclen, *The Application of the GATT/WTO Dispute Resolution System to Competition Issues*, 31 J. WORLD TRADE 5, 11 (1997).

138. On the other hand, such non-intervention can be seen as toleration and hence, passivity. On the basis of a teleological argument, however, Hoekman & Mavroidis have qualified "passive tolerance of a restrictive business practice" as "application of a measure." *See* Bernard M. Hoekman & Petros Mavroidis, *Competition, Competition Policy, and the GATT*, 17 WORLD ECONOMY 121, 141 and 145 (1994).

complaint also depends on the existence of some competition related norms and/or and their application. In contrast, it does not cover the more likely case that customs concessions are nullified or impaired by nothing more than private agreements.[139]

The two other conditions of a successful non-violation complaint do not give rise to any particularity that would have to be discussed in the present context. For the sake of brevity, these conditions will not be discussed here. Instead, one may refer to the thorough reasoning in the panel report in *Kodak/Fuji*.[140]

XI. *THE SITUATION COMPLAINT*

The preceding analysis has shown that competition related actions of Members already *de lege lata* must comply with important WTO obligations and that, in addition, non-violation complaints may be filed with regard to a Member's measures taken in the area of competition. It has also been established, however, that such obligations, and equally a non-violating measure – unusual circumstances aside – require the existence of competition laws or other positive action by a Member. Purely private conduct combined with the absence of competition laws or their non-application[141] can most probably only be caught by the so-called "situation complaint." However, there is no precedent in the history of the GATT/WTO dispute settlement system for such a situation complaint. Situation complaints have been raised in a number of cases,[142] but none of them resulted in a panel or Appellate Body report with findings based on Article XXIII:1(c) of the GATT 1994. Should such a complaint on the basis of governmental inaction against a private anti-competitive behavior be brought, one may expect the objection that the obligation to adopt and enforce competition laws must not be introduced into WTO law through the back door of the rather extraordinary situation complaint. Due to the absence of rulings

139. The situation is different, of course, where a Member's government in some way contributes to the anti-competitive private behavior or to its effects (and where other particularities like the ones just mentioned qualify as a measure).

140. JAPAN — FILM PANEL REPORT, *supra* n.23, at paras. 10.61–10.81 (for the second condition) and paras. 10.82–10.89 (for the third condition).

141. Except in the case where inaction in one case is coupled with positive action in another, similar case.

142. *See* 1 GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE, II.A.2.(5)(b) (6th ed. 1995).

based on situation complaints, it has also been argued that Article XXIII:1(c) of the GATT has fallen into *desuetudo.*[143] However, even if it remained largely unused to date, the situation complaint is an established and confirmed[144] part of WTO law.[145] Therefore, what this complaint covers, is already part of the world trading system and would not be *introduced* as a new dimension. In the literature, it has specifically been suggested that legislative or administrative governmental inaction against privately erected market barriers may be a case of application of the situation complaint.[146] The fear that the situation complaint could give rise to an *obligation* to adopt or enforce competition laws is also exaggerated in that the quasi-judicial rules and procedures of the DSU apply only up to the circulation of the panel report.[147] Regarding the adoption and the surveillance and implementation of recommendations and rulings, the old dispute settlement rules and procedures contained in the Decision of April 12, 1989 continue to apply.[148] It remains that the solution, which is adopted at the conclusion of a situation dispute (and accepted by the respondent), *may* provide for the responding government's intervention against the anti-competitive private behavior. Certainly, given the role of situation complaints in the practice, it is not the most likely scenario that a situation complaint of the kind described will emerge in the current dispute settlement system,[149] and others have questioned whether this would provide an appropriate forum,[150] or even argued that

143. *See* Ernst-Ulrich Petersmann, *Violation Complaints and Non-violation Complaints in Public International Trade Law*, 34 GER. Y.B. INT'L L. 175, 227 (1991).

144. *See* DSU, *supra* n.47, art. 26.2. *See also* Roessler, *The Concept of Nullification and Impairment in the Legal System of the World Trade Organization, supra* n.52, at 140.

145. Given that the existence of the situation complaint was reconfirmed in the Uruguay Round, it would be difficult to imagine that a dispute settlement panel entrusted with the task of assessing a situation complaint would rule that situation complaints no longer exist.

146. Roessler, *The Concept of Nullification and Impairment in the Legal System of the World Trade Organization, supra* note 52, at 139-40; Mavroidis & Van Siclen, *supra* n.138, at 12, n.10; Matsushita, *supra* n.48, at 370-71.

147. DSU, *supra* n.47, art. 26.2. It appears that Article 26.2 of the DSU excludes the possibility of an appeal against a panel report on a situation complaint. The consequence is that the Appellate Body would not be called to review the legal criteria for a successful situation complaint developed by the panel on the basis of Article XXIII:1(c) of the GATT 1994 and Article 26.2 of the DSU.

148. B.I.S.D. 36S/61-67.

149. Mavroidis & Van Siclen, *supra* n.138, at 12, n.10.

150. Hoekman & Mavroidis, *supra* n.139, at 139.

such a course of action would be "risky" and "premature."[151]

Should such a situation complaint nevertheless be brought, the legal standards to be employed for the decision about its success would have to be developed by the panel concerned. In the literature, it has been suggested that, similarly to non-violation complaints, the complainant would have to establish that it had a reasonable expectation that the situation would not occur and, in addition, a reasonable expectation that the government would intervene to correct this measure.[152] Without discussing in any detail the nature of the yet unknown conditions for a successful situation complaint, it should just be pointed out that these conditions could also be easier to satisfy than suggested, given that a cartel can erect barriers to the market access of foreign competitors that are equivalent to a governmental import restriction (as regards the effect on importers). It should finally be mentioned that the difficulties of the fact-finding process of a situation dispute arising from restrictive business practices are likely to be significant,[153] which reaffirms the statements made in this Article in that connection.[154]

CONCLUSION

The conclusion is simple: despite the fact that the existing WTO law already contains obligations with regard to the design and application of competition laws, there is a great interest in the negotiation of additional and specific commitments within a new WTO competition agreement.

To the extent that WTO law already imposes standards for the design and application of competition laws, the existing dispute settlement system of the WTO applies. Its non-application to new and additional rules to be negotiated within a future WTO competition agreement would be a step back — not in a formal sense, but in a substantive sense.

The existing dispute settlement system of the WTO provides for a standard of review which is also appropriate for competition law. The WTO dispute settlement system, however, shows a

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151. Matsushita, *supra* n.48, at 370-71.

152. Roessler, *The Concept of Nullification and Impairment in the Legal System of the World Trade Orgadnization*, *supra* n.52, at 139-40.

153. *Id.* at 140.

154. *See supra* Sec. IX.

number of weaknesses in the area of fact-finding, which should become particularly noticeable in the examination of competition-related individual decisions by domestic competition authorities. These weaknesses are present in the procedure followed by panels, to whom the establishment of facts is reserved. The most serious weakness relates to the problem of the communication of confidential information. There has not been a satisfactory solution to this problem so far, although the need for such a solution is pressing. The current review of the WTO dispute settlement system should provide an opportunity to find such a solution.

The current review of the dispute settlement system should also be used in order to improve the panel structure. It should guarantee greater institutional independence of panels and their members.