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Emerging WTO Competition Jurisprudence and its Possibilities for Future Development

*Alberto Alvarez-Jiménez**

A new competition jurisprudence is emerging within the World Trade Organization (“WTO”) and its Dispute Settlement Body (“DSB”). This jurisprudence first emerged with the WTO Panel’s (“Panel”) decision in *Japan - Measures Affecting Consumer Photographic Film and Paper*,¹ and continued with the Panel’s and Appellate Body’s (“AB”) astonishing reports in *United States - Anti-Dumping Act of 1916*² and the Panel report in *Argentina - Measures Affecting the Export of Bovine Hide and the Import of Finished Leather*.³

The forthcoming Panel report, *Mexico - Measures Affecting Telecommunications Services* will continue this trend.⁴

At first, this new jurisprudence may appear odd, given that the WTO framework lacks a complete set of rules for competition matters. However, the way the Panel and the AB expanded the scope of WTO law over a domestic antitrust issue in *United States - Anti-Dumping Act of 1916*, and the statements made by the Panel regarding trade and competition within

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¹ *Japan - Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (Apr. 22, 1998) [hereinafter *Film Report*].

² *United States - Anti-Dumping Act of 1916*, WT/DS136/R (Mar. 31, 2000) [hereinafter *Act Panel Report*]; *United States - Anti-Dumping Act of 1916*, WT/DS136/AB/R & WT/DS162/AB/R (Aug. 28, 2000) [hereinafter *Act AB Report*]. Both Reports discussed together will hereinafter be referred to as the Act Decisions. There was another decision regarding the Anti-Dumping Act of 1916 rendered by the same members of the first-mentioned Panel in a claim raised by Japan. See WT/DS162/R (May 29, 2000).

³ WTO Panel Report, *Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WTO Doc. WT/DS155/R (Dec. 19, 2000) [hereinafter *Bovine Hides Report*]. This Panel report had another component regarding a violation of Article III(2), which is not relevant for the purposes of this paper.

⁴ *Mexico - Measures Affecting Telecommunications Services*, WT/DS204/3 (Feb. 18, 2002) [hereinafter *Telecommunications Case*].

the WTO,⁵ indicate that WTO competition cases may have some hope of success in spite of current WTO limitations. Indeed, the Act Decisions are almost unquestionably activist rulings. These decisions portend the growth of a new approach concerning competition and trade. This approach suggests that the general principle of self-restraint regarding competition and trade established by the *Film Report* may have some exceptions. In fact, the development of a more developed WTO competition jurisprudence is underway.

It is important to note that the Panel's and AB's activism in the Act Decisions does not signal the disappearance of the WTO policy of self-restraint, which has existed since the *Film Report*. Neither is it the rule that competition matters will be decided with the activist orientation of the Act rulings. Rather, the Panel and the AB will be very cautious. Indeed, sophisticated adjudicators and skillful diplomats such as those sitting on WTO Panels and the AB, would not make the mistake of exerting flagrant activism on an issue as sensitive as competition and trade—an issue for more than five decades—without initiating serious negotiations.⁶ WTO adjudicators know first hand that its members would not tolerate such a high level of activism regarding competition.⁷ Thus, WTO Panels and the AB will not be providing solutions to all kinds of international competition issues because the new approach is not oriented toward such a goal.

For the sake of clarity, it is important to define what WTO competition jurisprudence means. Here, WTO competition jurisprudence refers to WTO Panels and AB decisions where: (1) members are forced to prevent the existence of, or attenuate the effects of, a certain private anti-competitive behavior;⁸ (2) members are obliged to ensure that their private companies

⁵ See *infra* Part III.A.7.

⁶ In 1948, the Havana Charter attempted to include special provisions on competition issues adversely affecting international trade. However, the U.S. Congress objected to the Havana Charter, and the creation of the International Trade Organization ("ITO") was halted, although the trading system continued under the GATT provisions. For material discussing the Havana Charter, see Robert R. Wilson, *Proposed ITO Charter*, 41 AM. J. INT'L L. 879 (1947) and George Bronz, *The International Trade Organisation Charter*, 62 HARV. L. REV. 1089 (1949).

⁷ Most likely, excessive activism on competition matters by Panels and the AB would raise serious allegations regarding the lawfulness of the respective reports on the basis that they impose new rights and obligations on WTO members, a result expressly banned by Articles 3.2 and 19.2 of the Dispute Settlement Understanding ("DSU"). In addition, such a degree of activism could lead Members to go so far as to make use of the mechanism of interpretation of the WTO covered agreements set forth in Articles IX(2) and IX(5) of the WTO Agreement in order to overrule the interpretations of WTO law contained in the given rulings. Undoubtedly, such an overruling would seriously impair the institutional reputation of WTO Panels and the AB, a consequence that the latter specifically would want to prevent.

⁸ *Bovine Hides Report*, *supra* note 3.

will behave in the pro-competition way prescribed by WTO law;⁹ (3) WTO law is stretched to cover a domestic antitrust issue;¹⁰ and (4) Panels and AB reports deny a WTO solution for an antitrust situation.¹¹ In sum, WTO competition jurisprudence comprises all Panel and AB rulings in cases where what is debated is the existence of a private anti-competitive behavior, the absence of the private competitive conduct that WTO law orders, or certain subject matters that fall within the traditional scope of domestic antitrust legislation, regardless of whether or not the decision provides a WTO solution.¹²

Part II of this article presents the WTO self-restraint approach regarding competition and trade before the new millennium, as set out in the *Film Report*. Part III attempts to untangle the new activist approach from the Panel and AB decision in *United States - Anti-Dumping Act of 1916*. Part IV postulates that the development of a WTO jurisprudence openly protecting private parties' interests may be behind the new orientation. Part V posits that WTO competition jurisprudence evolves under the tension between the approaches in the *Film Report* and in the *Anti-Dumping Act of 1916*. Part VI analyzes the *Bovine Hides Report*, Part VII draws on the *Act*, the *Bovine Hides Report*, and on the new competition dispute, the *Telecommunications Case*, to present a detailed picture of the possibilities for the development of WTO competition jurisprudence. Part VIII evaluates the *Telecommunications Case* initiated by the United States to open up the Mexican telecommunications sector, in light of past WTO competition jurisprudence. Part IX concludes.

First, however, it is necessary to specify to what the *Act* and the *Film Report* approaches refer. The *Film Report* approach refers to a disposition to interpret WTO law and jurisprudence in order not to provide a WTO solution for a competition problem. The *Act* approach, in contrast, signifies a readiness to interpret WTO law in a way that grants a WTO remedy to a competition dispute.

⁹ This is at issue in the *Telecommunications Cases*, *supra* note 4.

¹⁰ The *Act* rulings exemplify this type of WTO competition jurisprudence. See *supra* note 3.

¹¹ *Film Report*, *supra* note 2.

¹² Clearly, WTO law does not create rights or obligations for private persons or undertakings. Therefore, when WTO competition jurisprudence provides a WTO solution for a competition situation, it is based on a finding that a Member state, not a private company, is violating WTO law. However, this is not to say that this jurisprudence is irrelevant for the private sphere; if a violation of WTO law is declared to exist, these private undertakings will find that the most likely way in which the Member state will implement the recommendations or rulings of the DSB is by forcing them to change their behavior.

II. BEFORE 2000: SELF-RESTRAINT ON COMPETITION AND TRADE

The *Film Report* set a new tone for competition and trade disputes in the WTO by placing a heavy burden of proof on the use of the non-violation complaint of Article XIII(1)(b) of the GATT 1994 as a mechanism for solving competition cases.¹³ In that dispute, the United States alleged that the combined actions of the Japanese government and the anti-competitive Japanese film industries prevented U.S. companies from entering the Japanese market. U.S. companies should have been permitted into the market because of the successive trade rounds.¹⁴

The Panel in the *Film Report*¹⁵ stringently interpreted Article XIII(1)(b).¹⁶ Indeed, the Panel narrowed the likelihood of using this provision,¹⁷ in particular against private anti-competitive practices.¹⁸ In this case, the Panel imposed a heavy burden of proof on claiming member states, which have to provide "a detailed justification" that would:

address three issues: (1) whether the practices in question were

¹³ The relevant part of this Article provides:

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of . . .

b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, . . . the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable period of time, . . . the matter may be referred to the contracting party. The contracting party shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. . . .

¹⁴ See MICHAEL TREBILCOCK & ROBERT HOWSE, *THE REGULATION OF INTERNATIONAL TRADE* 476 (2d ed. 1999).

¹⁵ The *Film Report* has been the subject of broad analysis that will not be duplicated here. See Joel P. Trachtman, *The Domain of WTO Dispute Resolution*, 40 HARV. INT'L L.J. 333 (1999).

¹⁶ Before the *Film Report*, there existed within GATT jurisprudence other, more flexible trends under which the "non-violation or impairment concept also protects the broader balance of benefits that governments had a right to expect as a result of the reciprocal undertakings to observe the obligations in the GATT itself." Sung-joon Cho, *GATT Non Violations Issues in the WTO Framework: Are They the Achilles Heel of the Dispute Settlement Process?* 39 HARV. INT'L L.J. 311, 317 (1998).

¹⁷ See *infra* text accompanying note 89.

¹⁸ See Trachtman, *infra* note 29 and accompanying text.

government 'measures;' (2) if so, whether the measure in question related to a benefit reasonably anticipated to accrue from prior tariff concessions by upsetting the competitive relationship between imports and domestic products; and (3) whether the benefit accruing to the complainant state had in fact been nullified or impaired by the measure in question (causality).¹⁹

The Panel in the *Film Report* almost closed the door for disputes attempting to require competition through Article XIII(1)(b). Some thought this would mean an end to the WTO system, given that the WTO framework does not have a complete set of rules on competition; it has only a reduced number whose content is merely exhortatory.²⁰ This characteristic has led some scholars to maintain that there is no WTO provision ordering the elimination of private restrictive business practices.²¹ Therefore, because of the lack of WTO law and of the restrictions imposed by the *Film Report*, some authors envisioned that further developments in competition and trade by the DSB would be unlikely.²²

Others commented that any WTO competition jurisprudence would jeopardize the stability of the DSB. For instance, John Jackson maintains, "the dispute settlement system cannot and should not carry much of the weight of formulating new rules . . . by setting forth norms which carry the organization into totally new territory such as competition policy . . ."²³

However, the self-restraint of the *Film Report* did not reappear with the arrival of the new millennium, and the *Act Decisions* set out a new approach regarding competition and trade.

III. UNITED STATES - ANTIDUMPING ACT OF 1916: THE FIRST INDICATOR OF THE NEW APPROACH TO CERTAIN COMPETITION ISSUES UNDER THE WTO²⁴

The *Act Decisions*, the first of the new millennium relating to

¹⁹ TREBILCOCK & HOWSE, *supra* note 14, at 447.

²⁰ For a classification of WTO competition provisions, see *infra*, Part VII.A (displaying that not all WTO competition provisions are exhortatory).

²¹ See Maria Chiara Malaguti, *Restrictive Business Practices in International Trade and the Role of the World Trade Organization*, 33 J. WORLD TRADE 117, 137 (1998).

²² See, e.g., Trachtman, *supra* note 15, at 374. ("[T]oday there is no substantial WTO law relating to domestic competition policy. . . . Nor are there substantial multilateral agreements regarding competition or international competition policy. . . . Therefore, one cannot expect a "trade and competition" jurisprudence to develop from the Film case. There is insufficient textual authorization.").

²³ JOHN JACKSON, *THE JURISPRUDENCE OF GATT & THE WTO* 187 (2000).

²⁴ The objective of the analysis of the *Act Decisions* that follow are not to duplicate other articles that synthesize what the Panel and the AB stated in this case. The goal here is to decipher the new approach concerning competition and trade within the WTO by displaying the arguments and the interpretative techniques employed by the judicial framework of the DSB in deciding this case.

competition and trade, set a new and different approach to issues of competition in the WTO. This new approach complements the self-restraint orientation of the *Film Report*. A number of elements show that the Panel and the AB did not consider self-restraint when deciding the *Act Decisions*: (1) the way the Panel and the AB decided the dispute; (2) the interpretative methods employed to set the scope of the relevant WTO provisions; (3) the way they handled the *travaux préparatoire* (preparatory documents) of the applicable WTO precepts; (4) the manner in which the Panel and the AB narrowed previous rulings so as to avoid their being applied in the *Act Decisions*; and (5) the statements made regarding trade and antitrust made by the Panel²⁵—apparently endorsed by the AB which kept silent about them on appeal.²⁶ Future competition Panels may embrace this approach by applying some of the ruling's interpretative methods.

The *Act Decisions* indicate that the judicial framework of the DSB²⁷ has enough legitimacy to be less conservative regarding competition matters under certain exceptional circumstances, while maintaining its traditional prudence when interpreting WTO precepts. Deciding a competition case against the United States on WTO legal grounds, would force the United States to override its domestic antitrust legislation and disparege its long-lasting determination to oppose any multilateral competition agreement.²⁸ Only well-established adjudicators have the willingness to adopt these determinations. This is why the *Act Decisions* are indicative of a different approach to competition and trade.

Since the *Act Decisions* have opened the door for a more varied WTO competition jurisprudence, we should not necessarily expect an explosion of competition rulings. The development of WTO competition jurisprudence hinges on many factors not in the hands of Panels or the AB. Development depends on member states bringing good cases before the DSB. This complex process occurs within complaining member states and is dependant upon several circumstances.

First, some member states may have WTO-thematic agendas they wish to develop through dispute settlement, and within these agendas, competition is only one issue, which may or may not be a priority.²⁹

²⁵ See *infra* Part III.A.7.

²⁶ *Act AB Report*, *supra* note 2.

²⁷ The judicial framework of the DSB is understood in this paper to mean Panels and the AB.

²⁸ See, e.g., INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE, U.S. DEP'T OF JUSTICE, FINAL REPORT (2000), at <http://www.usdoj.gov/atr/icpac/finalreport.htm> (last visited March 5, 2004). However, it is worth mentioning that some developing-country Members also oppose the inclusion of antitrust issues specifically within the WTO.

²⁹ See Joel Trachtman & Philip M. Moremen, *Costs & Benefits of Private Participation in WTO Dispute Settlement: Whose Rights Is It Anyway?*, 44 HARV. INT'L L.J. 221 (2003) (providing a complete review of possible WTO strategic litigation).

Second, while there is no multilateral international agreement on competition, recent years have seen an increasing number of bilateral competition agreements aimed at enhancing cooperation between national antitrust authorities to deal with trans-border competition issues.³⁰ A member state interested in drawing on WTO mechanisms to solve an international competition problem therefore must gauge how WTO litigation will affect the antitrust cooperation with the defendant member state. It is possible under some circumstances that the risk of lessening such bilateral cooperation will prevent some competition cases from being taken before the WTO DSB.³¹ Third, WTO litigation responds to the needs of private industries, so competition cases will never reach the DSB if there is not an important private interest behind them, able to put pressure on Member States to trigger the WTO dispute settlement system.³² These circumstances show that for a competition case to get a WTO Panel decision the fulfillment of multiple conditions outside the purview of either the AB or the Panels is necessary.

Despite these hurdles, the circumstances are favorable for some cases to lead to the development of WTO competition jurisprudence. The U.S. government opposes the incorporation of competition within the WTO, and without U.S. support, an agreement would be difficult to achieve. Therefore, some member states, including the European Union and Japan, who want to incorporate competition issues within the WTO framework

³⁰ The United States and the European Union are the leading parties to bilateral competition agreements. The United States has bilateral treaties with Australia, Brazil, Canada, Germany, European Union, Israel, Japan, and most recently, Mexico. See ANTITRUST DIVISION, U.S. DEP'T OF JUSTICE, ANTITRUST COOPERATION AGREEMENTS at http://www.usdoj.gov/atr/public/international/int_arrangements.htm (last visited March 4, 2004). The European Union has bilateral competition agreements with Canada, Israel, Moldova, Cyprus, the United States, the Republic of Kazakhstan, Russia, Switzerland, Turkey and the Ukraine. See EUROPEAN UNION, INTERNATIONAL BILATERAL RELATIONS at <http://europa.eu.int/comm/competition/international/bilateral> (last visited March 4, 2004).

³¹ This was not the case with the European Union and Japan regarding the *Act Decisions* against the United States.

³² The exceptions to this rule are systemic complaints, which are, according to Sevilla, "those designed to enforce more diffuse interests—for example, the interests of all potential exporters to a particular country, rather than a specific sector—or are aimed at protecting the integrity of the rule-based system more generally." Christina Sevilla, *Explaining Patterns of GATT/WTO Trade Complaints*, Weatherhead Center for International Affairs. Working Paper Series 98-01 at 6 (1998) at <http://www.wcfia.harvard.edu/papers/98-01.pdf>. The possibility of bringing systemic complaints before the DSB was highlighted by the AB in its report in *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, where it held that Members do not have to demonstrate a legal interest to bring a case. See *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (adopted Sept. 25, 1997) at 589 [hereinafter *Bananas AB Report*]. For an analysis of the consequences of the possibility of bringing systemic disputes over the whole structure of the DSB, see Yuji Iwasawa, *WTO Dispute Settlement as Judicial Supervision*, 5 J. OF INT'L. ECON. L. 287 (2002).

may present competition cases based on WTO legal grounds before the DSB. Thus, WTO competition litigation may become an alternative for the absence of or deadlocked negotiations.

A. Unraveling the Activist Approach of the *Act* Rulings

The main issue of the *Act Decisions* case was whether the civil and criminal penalties contained in the Anti-Dumping Act of 1916 that were to be imposed by U.S. federal courts on persons involved in international predatory pricing affecting U.S. markets violated Article VI of GATT 1994³³ and provisions of the *Anti-Dumping Agreement*.³⁴ The U.S. Anti-Dumping Act of 1916 provides the following:

It shall be unlawful for any person importing or assisting in importing any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States at a price substantially less than the actual market value or wholesale price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States: *Provided*, That such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.

Any person who violates or combines or conspires with any other person to violate this section is guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding \$5,000, or imprisonment not exceeding one year, or both, in the discretion of the court.

Any person injured in his business or property by reason of any violation of, or combination or conspiracy to violate, this section, may sue therefore in the district court of the United States for the district in which the defendant resides or is found or has an agent, without respect

³³ Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], General Agreement on Tariffs and Trade (GATT 1947); WORLD TRADE ORGANIZATION, THE LEGAL TEXTS, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS 147 (1999) [hereinafter *WTO Legal Texts*] at 430.

³⁴ WTO Agreement, *supra* note 33, Annex 1A; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, (Apr. 15, 1994) [hereinafter *Anti-Dumping Agreement*]; *WTO Legal Texts*, *supra* note 33.

to the amount in controversy, and shall recover threefold the damages sustained, and the cost of the suit, including a reasonable attorney's fee.

The foregoing provisions shall not be construed to deprive the proper State courts of jurisdiction in actions for damages thereunder.³⁵

The European Union claimed that:

[T]he objective criteria for determining whether a law is subject to the disciplines of Article VI and the Anti-Dumping Agreement are (i) whether the law is targeted at imports, and (ii) whether it defines the regulated conduct as price discrimination in the form of lower prices in the market of the importing country than those practiced on the market of the country of export. On that basis, the 1916 Act is a law which is subject to Article VI of the GATT 1994 because

I. it is targeted at imports. Its prohibition is directed at 'any person importing or assisting in importing any articles in the United States.' Such persons who breach the prohibition are guilty of a misdemeanor, and are liable for treble damages to persons who are injured by the prohibited conduct; and

II. The regulated conduct is defined by reference to discrimination between the price of the imported products and 'the actual market value or wholesale price of such articles. . . in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported.'³⁶

The United States made several arguments, any of which would have been attractive to the Panel or the AB if they had approached the case with self-restraint. However, both took an activist stance and declared that the U.S. Anti-Dumping Act of 1916 was inconsistent with WTO law.³⁷ This activism is uncovered after analyzing the interpretative techniques employed by the AB and Panel in deciding this case; the methods were all oriented toward the same objective: incorporating the antitrust issue of international predatory pricing within the WTO system.³⁸

³⁵ Antidumping Act of 1916, 15 U.S.C. § 72 (2004).

³⁶ *Id.* ¶ 3.82.

³⁷ This result was anticipated by Diane Keppler. See Diane Keppler, *The Geneva Steel Co. Decision Raises Concerns in Geneva: Why the 1916 Antidumping Act Violates the WTO Antidumping Agreement*, 32 GEO. WASH. J. INT'L L. & ECON. 293 (1999).

³⁸ This article does not suggest that *all* Panel and AB decisions are result-oriented, but that the *Act* rulings were.

1. Narrowing Previous Cases and Expanding WTO Rules: Interpretative Techniques Make Challenging Legislation under Article VI and the Anti-Dumping Agreement Possible

The United States attempted to sway the Panel and the AB with the argument that the legislation could not be challenged under Article VI of the GATT 1994. The United States argued that only specific measures adopted in conformity with the given legislation could be matters for WTO dispute settlement.³⁹ Therefore, member states should wait for a concrete application of the Anti-Dumping Act of 1916 before bringing a case to the DSB. It would have been easy, under the judicial framework of the DSB, to accept this argument. Indeed, the Panel or the AB could have used past GATT practice⁴⁰ and recent WTO rulings⁴¹ to construct an argument to support such a view.⁴²

However, the AB questioned defense. The AB narrowed *Guatemala - Cement* by maintaining that it did not refer to a discussion of whether legislation as such could be a subject matter for the DSB to consider within

³⁹ See *Act Panel Report*, *supra* note 3, at ¶ 3.27.

⁴⁰ EEC - Regulation on Imports of Parts and Components, May 16 1990, GATT B.I.S.D (37 Supp.) at 132.

⁴¹ *Guatemala - Anti-dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R (Nov. 25, 1998) [hereinafter *Guatemala - Cement*].

⁴² The United States argued that in *EEC - Regulation on Imports of Parts and Components* the Panel found that "the mere existence" of the anti-circumvention provision of the European Communities' anti-dumping legislation was not inconsistent with the European Communities' GATT 1947 obligations, even though the European Communities had taken GATT-inconsistent measures under that provision. Additionally, to support its point, the United States also referred to the AB report in *Guatemala - Cement*:

Furthermore, Article 17.4 of the *Anti-Dumping Agreement* specifies the types of "measure" which may be referred as part of a "matter" to the DSB. Three types of anti-dumping measure are specified in Article 17.4: definitive anti-dumping duties, the acceptance of price undertakings, and provisional measures. According to Article 17.4, a "matter" may be referred to the DSB *only if* one of the relevant three anti-dumping measures is in place. This provision, when read together with Article 6.2 of the DSU, requires a Panel request in a dispute brought under the *Anti-Dumping Agreement* to identify, as the specific measure at issue, either a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure. This requirement to identify a specific anti-dumping measure at issue in a Panel request in no way limits the nature of the *claims* that may be brought concerning alleged nullification or impairment of benefits or the impeding of the achievement of any objective in a dispute under the *Anti-Dumping Agreement*. As we have observed earlier, there is a difference between the specific measures at issue—in the case of the *Anti-Dumping Agreement*, one of the three types of anti-dumping measure described in Article 17.4—and the claims or the legal basis of the complaint referred to the DSB relating to those specific measures. In coming to this conclusion, we note that the language of Article 17.4 of the *Anti-Dumping Agreement* is unique to that Agreement.

Id. ¶ 79.

Article VI and the *Anti-Dumping Agreement*.⁴³ Additionally, the AB expanded Article VI of the GATT 1994 and Article 17 of the *Anti-Dumping Agreement* by holding that nowhere within them was that matter excluded⁴⁴ and that, therefore, it must be understood that legislation, and not only the specific measures against dumping adopted in conformity with the legislation, could be a subject for DSB consideration.

2. *The Distinction between Mandatory and Discretionary Legislation*

The United States also argued that the Anti-Dumping Act of 1916 is, discretionary, not mandatory, legislation because it does not mandate actions inconsistent with the WTO regime.⁴⁵ It was quite easy for the Panel and the AB to reject this argument given that, as the European Communities⁴⁶ demonstrated, within GATT and WTO practice, only legislation that provides the executive branch of member states with discretion can be considered discretionary; the Anti-Dumping Act of 1916 in effect confers discretion primarily on the judicial branch of the United States. Therefore, although the Justice Department had discretion to bring a case under the Anti-Dumping Act of 1916, such discretion was not considered sufficient to transform the Act into discretionary legislation.⁴⁷

Intertwined with the issue of mandatory/discretionary legislation was the United States' argument that the Anti-Dumping Act of 1916 did not violate the WTO regime owing to the possibility of its being interpreted by U.S. courts in a manner abiding by this legal order.⁴⁸

3. *Narrowing Past WTO Jurisprudence: The Interpretative Technique Used to Reject the Argument of the Possibility of Interpreting the Act in a WTO-Consistent Manner*

The United States argued that even if legislation could violate Article VI and the *Anti-Dumping Agreement*, the Anti-Dumping Act of 1916 did not do so, because it was possible for it to be interpreted in a WTO-consistent fashion by U.S. courts. Therefore, the Anti-Dumping Act of 1916 did not mandate actions inconsistent with the WTO.⁴⁹ The United States based its argument on *United States - Measures Affecting the Importation, Internal Sale and Use of Tobacco*⁵⁰ a report that assigned a

⁴³ See *Act AB Report*, *supra* note 2, ¶ 72.

⁴⁴ See *id.* ¶ 62.

⁴⁵ See *Act Panel Report*, *supra* note 2, ¶ 3.26.

⁴⁶ The expression "European Communities" is used in Article XI of the WTO Agreement to refer to the "European Union." Both monikers are used in this article.

⁴⁷ See *id.* ¶ 6.169; *Act AB Report*, *supra* note 2, ¶ 91.

⁴⁸ See *Act Panel Report*, *supra* note 2, ¶ 3.32.

⁴⁹ See *id.* ¶ 6.85.

⁵⁰ See *United States - Measures Affecting the Importation, Internal Sale and Use of*

heavy burden of proof on claimants, forcing them to demonstrate that it was impossible to interpret the provision in a way respectful of the WTO.⁵¹

Again, however the Panel's activist approach led it to reject the United States' reasoning. The Panel narrowed the scope of the *Tobacco Case* by establishing a basic difference from the Anti-Dumping Act of 1916 situation.

[I]n the *United States - Tobacco* case, the Panel had to deal with the question whether the ambiguous term at issue mandated a violation of Article VIII of the GATT 1947. In the present case, what is at issue is whether the terms of the 1916 Act are such as to make Article VI *applicable* to that law. We are consequently at an earlier stage of our analysis than the Panel in the *United States - Tobacco* case . . . consequently, the situations faced by this Panel and the Panel in the *United States - Tobacco* case are factually different.

These differences have implications for the burden of proof . . .⁵²

The change to the burden of proof was dramatic:

[I]t is not necessary for the EC to demonstrate that there was no court decision that applied the 1916 Act in a WTO-consistent manner. If we find that the US court practice is not sufficiently well established, or that there is no prevailing interpretation, or no sufficiently clear reasoning regarding the way the transnational price discrimination test of the 1916 Act should be applied, we shall rely on the text of the law itself. However, for the United States to prevail, it would be sufficient in our view to show that there is one definitive interpretation supporting its position.⁵³

This allocation of the burden of proof proved to be too onerous for the United States, because there was no definite judicial interpretation showing that the Anti-Dumping Act of 1916 was applied in a way that escaped the disciplines of Article VI of the GATT 1994. Thus, the Panel determined that the United States failed to prove this defense,⁵⁴ a conclusion that was endorsed by the AB.⁵⁵ If the Panel and the AB had practiced self-restraint in this case, they could have used the argument of possible WTO-consistent interpretations of the Anti-Dumping Act of 1916 as a mechanism to show deference to the United States and to avoid the expansion of the WTO over

Tobacco, GATT B.I.S.D. (41 Supp.) at 131 (1994) [hereinafter *Tobacco Case*].

⁵¹ See *Act Panel Report*, *supra* note 2, ¶ 6.85.

⁵² *Id.* ¶¶ 6.86 – .87.

⁵³ *Id.* ¶ 6.135.

⁵⁴ See *id.*

⁵⁵ See *Act AB Report*, *supra* note 2, ¶ 97.

U.S. legislation condemning international predatory pricing.

4. *Highlighting Similarities and Diminishing Differences: The Interpretative Strategy to Incorporate International Predatory Pricing within the Concept of Dumping*

The central issue in the Anti-Dumping Act of 1916 dispute was whether Article VI and the *Anti-Dumping Agreement* applied to national antitrust legislation condemning international predatory pricing. The European Communities argued that they did. However, the United States contested the application of the foregoing WTO precepts over the Anti-Dumping Act of 1916 because there was a difference between the two concepts—specifically, that it was more difficult to prove the existence of predatory pricing than that of dumping.⁵⁶ This was true because in establishing the presence of predatory pricing, it was necessary to prove (1) the intent to destroy or injure an industry in the United States,⁵⁷ (2) that the price difference was “substantial,” and, (3) that the importation was common and systematic⁵⁸—requirements not contemplated to prove the existence of dumping. The United States also argued that the Anti-Dumping Act of 1916 had an antitrust objective, which made it different from anti-dumping legislation; therefore, it could not be covered by the WTO regime.⁵⁹

If the Panel and the AB had been restrained, they would have highlighted the disparities between dumping and international predatory pricing and concluded that they were not equivalent. Therefore, the Anti-Dumping Act of 1916 would have fallen outside the WTO framework. In the end, there was little room for complaint, because when the WTO and the *Anti-Dumping Agreement* were negotiated, no one expected that they would be applied to legislation condemning international predatory pricing, an issue that traditionally had fallen within the scope of domestic antitrust law.⁶⁰

Nevertheless, the Panel and the AB did not approach the case with self-restraint. Both decided that the essential element of dumping is the:

price difference between like products sold in two markets, one of which is not within the jurisdiction of the same member, their price in the country of exportation being lower than their price in the country of

⁵⁶ See *Act Panel Report*, *supra* note 2, ¶ 3.89

⁵⁷ See *id.*

⁵⁸ See *id.* ¶ 3.90.

⁵⁹ See *id.* ¶ 6.10.

⁶⁰ See *infra* Part III.A.6, analyzing the negotiating history of the Anti-Dumping Agreement.

production or in a third country to which they are exported.⁶¹

Any practice that possesses this element is “dumping.” The Panel stated:

This test [of the Act] includes requirements similar to the introduction of the dumped product into the commerce of one Member since it refers to “import or sell or cause to be imported or sold. . . within the United States.” We further note that the 1916 Act is premised on a comparison between two prices, one in the United States, the other one in the country of production of the product or in a third country where the product is also sold. There is consequently a very strong similarity between the definition of dumping in Article VI and the transnational price discrimination test found in the 1916 Act.

This said, would there be elements in the text of the 1916 Act that would lead us to conclude that the trans-national price discrimination test in the 1916 Act nevertheless does not meet the definition of dumping in Article VI? We note that the 1916 Act relies not only on the actual market value but also on wholesale price. It also refers to the “principal markets of the country of . . . production [of the imported merchandise]” or of “other foreign countries to which they are commonly exported.” We do not find the nature of these requirements to be different from those of Article VI:1 to such a degree as to make them fall outside the concept of “comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country” found in Article VI:1(a). The 1916 Act also refers to sales on the “principal markets” of “other foreign countries to which they are commonly exported.” This may not be the “highest comparable price for the like product for export to any third country in the ordinary course of trade” found in Article VI:1(b) but, once again, its nature does not, in our view, depart to a significant degree from the criteria of Article VI:1 and it does not relate to other concepts which, by their nature, could be differentiated from those found in Article VI:1. Finally, we note that the 1916 Act does not provide for the possibility to use a “constructed” normal value, within the meaning of Article VI:1(b)(ii). However, this only makes the transnational price discrimination test in the 1916 Act “narrower” than the definition of “dumping” in Article VI:1, without making it fall outside its scope. We also note that the 1916 Act provides for adjustments. Even though these adjustments are not those found in the last sub-paragraph of Article VI:1, they do not affect the scope of the price discrimination test in the 1916 Act in relation to Article VI. On the contrary, they confirm the similarity of the two texts as far as the criteria for the identification of the practice at issue is concerned.⁶²

⁶¹ See *Act Panel Report*, *supra* note 2, ¶ 6.104.

⁶² *Id.* ¶¶ 6.108–09.

The AB endorsed this conclusion by noting the following:

On the basis of the wording of the 1916 Act, it is clear that the 1916 Act provides for civil and criminal proceedings and penalties when persons import products from another country into the territory of the United States, and sell or offer such products for sale at a price less than the price for which the like products are sold or offered for sale in the country of export or, in certain cases, a third country market. In other words, in the light of the definition of “dumping” set out in Article VI:1 of the GATT 1994, as elaborated in Article 2 of the Anti-Dumping Agreement, the civil and criminal proceedings and penalties contemplated by the 1916 Act require the presence of the constituent elements of “dumping.” The constituent elements of “dumping” are built into the essential elements of civil and criminal liability under the 1916 Act. The wording of the 1916 Act also makes clear that these actions can be taken only with respect to conduct that presents the constituent elements of “dumping.” It follows that the civil and criminal proceedings and penalties provided for in the 1916 Act are “specific action against dumping.” We find, therefore, that Article VI of the GATT 1994 applies to the 1916 Act.⁶³

Once the Panel and the AB reached the conclusion that the Anti-Dumping Act of 1916 was directed at dumping,⁶⁴ all the differences between dumping and international predatory pricing as defined in the Act, and the civil and criminal consequences, became violations of Article VI and of Article 4 of the *Anti-Dumping Agreement*. Among the differences that the Panel declared WTO-inconsistent were the possibility for individuals, not industries, to sue in civil courts for international predatory pricing⁶⁵ and the possibility to start the civil process due to an offer or the sole existence of intent, without the occurrence of an injury.⁶⁶

5. *Anti-Dumping Measures Are the Only Measures that Member States May Adopt Against Dumping*

The United States argued that, even if the Anti-Dumping Act of 1916 was directed at dumping, it was not contrary to the WTO regime because Article VI(2) of the GATT 1994 provides that member states *may* adopt

⁶³ *Act AB Report, supra* note 2, ¶ 130.

⁶⁴ Even the cost recoupment criterion, by which in addition to intent of injuring it was necessary to prove that there was a likelihood of recoupment of the losses due to the international predatory pricing, elaborated by *Brooke Group v. Brown & Williamson Tobacco Co.*, 509 U.S. 209 (1993), was rejected as a difference that would have led to the exclusion of the Anti-Dumping Act of 1916 from the scope of Article VI of the GATT 1994 and of the *Anti-Dumping Agreement*. See *Act Panel Report, supra* note 2, ¶ 6.151.

⁶⁵ See *id.* ¶¶ 6.213-214.

⁶⁶ See *id.* ¶ 6.180.

anti-dumping measures when dumping is proved within the given investigation.⁶⁷ This would mean that member states could take other measures, such as the civil and criminal ones contemplated by the Act. However, the Panel and the AB did not give in to this argument. Instead, they upheld the European Communities' legal construction. Under this interpretation, Article VI(2) applies to Article 18(1) of the *Anti-Dumping Agreement*, so that the term "may" refers exclusively to the Member States' right to impose anti-dumping measures up to the level of the margin of dumping, or to impose measures up to a level that eliminates the injury to the respective national industry.⁶⁸ Thus, member states could combat dumping only with anti-dumping measures.

*6. Ignoring the Negotiating History of Article VI of the GATT, and
Emphasis on Article 31 of the Vienna Convention: Strategies to Deal with
the Travaux Préparatoire*

The United States invoked the legislative history of the GATT and the WTO to support its arguments. First, the United States contended that the

⁶⁷ See *id.* ¶¶ 3.218–219.

⁶⁸ The *Act* Panel said:

In Article VI:2, the only term the meaning of which is actually debated by the parties is the verb "may." The ordinary meanings of the verb "may" as an auxiliary verb include "have ability or power to, can" Taken on its own, this verb could mean that Members have the possibility only to impose duties or that they have a choice between duties and other types of measures. If the word "may" was used in the first meaning, it could be argued that the term "only" should have been added right after it so as to limit its meaning. However, such an argument disregards the immediate context of the word "may." The terms "in order to offset or prevent dumping" set up the framework in which the term "may" must be understood. By specifying that the purpose of anti-dumping measures is to "offset" dumping, not to impose punitive measures, Article VI:2, first sentence, limits the meaning of the word "may" to giving Members the choice between a duty equal to the dumping margin and a lower duty, not between anti-dumping duties and other measures. . . .

In substance, we consider that the provisions of Articles 1 and 18.1 limit the anti-dumping instruments that may be used by Members to those expressly contained in Article VI and the Anti-Dumping Agreement. Except for provisional measures and price undertakings, the only type of measures foreseen by the Anti-Dumping Agreement is the imposition of duties. We also note that Article 9.1 of the Anti-Dumping Agreement establishes an intimate link between the calculation of a dumping margin provided for in Article 2 of the Agreement and the final measures that may be imposed. We therefore conclude that the context of Article VI confirms the provisional conclusion we had reached on the basis of the ordinary meaning of that provision.

See *id.* ¶¶ 6.189 and 6.196. This reasoning was endorsed by the AB. See *Act AB Report*, *supra* note 2, ¶¶ 114–24.

demise of the Havana Charter, with its antitrust provisions, and later, the 1960 *Decision on Arrangements for Consultation on Restrictive Business Practices*⁶⁹ which explicitly recognized that antitrust issues were not addressed under the GATT, were proof that issues like international predatory pricing contemplated by national legislation were outside the scope of the GATT and the WTO.⁷⁰ Second, the United States cited the negotiating history of Article VI, including the GATT 1947, the Havana Charter, and its evolution through the Tokyo Round to the WTO, to try to argue that Article VI had not stipulated that anti-dumping measures were the only ones Member States could adopt to counteract dumping.⁷¹

Again, if the Panel and the AB had exerted self-restraint in this case, they would have acknowledged the negotiating history of the GATT, as it does not expressly provide that international predatory pricing be covered by the anti-dumping precepts of the GATT 1994 and the WTO. However, the Panel and the AB went far in interpreting Article VI and the *Anti-Dumping Agreement*, and obviously, they could not do that by grounding their arguments on the detailed legislative history.

The ways in which the Panel and the AB dealt with the historical interpretation of the WTO provisions in this case display their activist approach. First, when the Panel and the AB evaluated whether the Anti-Dumping Act of 1916 was directed at a practice that contained the constitutive elements of dumping, they ignored the negotiating history; they never even explained how they would go about expanding Article VI of GATT 1994 and the *Anti-Dumping Agreement* to cover the issue of international predatory pricing, despite the failure of the Havana Charter and the existence of the decision stating that competition matters, in principle, are not part of the WTO.⁷² In sum, by ignoring the intention of the parties, both the Panel and the AB eschewed the problem of the legislative history.

This, though, was not the only strategy employed by the Panel and the AB. Concerning the second matter—whether anti-dumping measures were the only ones permitted by the drafters of the WTO to counteract dumping—the Panel made use of Article 31 of the Vienna Convention. Article 31 calls for the use of the *travaux préparatoire* when the interpretation of the text of a treaty is unclear. Thus, the Panel's decision was to attenuate the importance of the negotiating history in this case by

⁶⁹ GATT Resolutions, B.I.S.D. 28 (9th Supp.) (1961).

⁷⁰ See *Act Panel Report*, *supra* note 2, ¶¶ 3.70–.71.

⁷¹ See *id.* ¶¶ 3.233–.237.

⁷² The 1960 Decision is now part of the GATT/1994. Indeed, the introductory note of the GATT 1994 states in 1(b)(iv) that “1. The General Agreement on Tariffs and Trade 1994 (‘GATT 1994’) shall consist of . . . (b)(iv) other decisions of the CONTRACTING PARTIES to GATT 1947.” *WTO Legal Texts*, *supra* note 33, at 17.

stating:

[I]f necessary to confirm the meaning resulting from the application of Article 31 or to determine the meaning when the interpretation under Article 31 leaves the meaning ambiguous or obscure or leads to results manifestly absurd or unreasonable, we may have recourse to the supplementary means of interpretation under Article 32 of the Vienna Convention.⁷³

The Panel held that since its interpretation of Article VI was clear, it was not necessary to confirm it through an extensive use of the *travaux préparatoire* of the WTO provisions of the case:

However, the Panel analyzed one specific document, the Report of the Working Party on Modifications to the General Agreement, which was adopted by the Contracting Parties on September 1-2, 1948, and embraced the interpretation of it that supported its finding based on the text of the provisions.⁷⁴

The AB applied the same interpretative technique regarding this issue by stating:

The United States argues, on the basis of the history of this provision, that the phrase “anti-dumping measure” refers *only* to definitive anti-dumping duties, price undertakings and provisional measures. However, the ordinary meaning of the phrase “an anti-dumping measure” seems to encompass all measures taken against dumping. We do not see in the words “an anti-dumping measure” any explicit limitation to particular types of measure.⁷⁵

In other words, if the interpretation of the text of the relevant GATT 1994 or WTO provisions expanding the WTO to certain antitrust issues is considered to be clear by the judicial framework of the DSB, the interpretation can disregard intense debates over the negotiating history as

⁷³ *Act Panel Report*, *supra* note 2, at ¶ 6.187; Article 32 of the Vienna Convention provides:

Supplementary means of interpretation.

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning when interpretation according to Article 31: (a) leaves the meaning ambiguous; or (b) leads to a result which is manifestly absurd or unreasonable.

⁷⁴ *See id.* ¶¶ 6.201–203.

⁷⁵ *Act AB Report*, *supra* note 2, ¶ 119.

an argument opposing such expansion. Thus, both the Panel and the AB gave a clear prevalence to the interpretation of the text of the relevant provisions of the case rather than its historical background.⁷⁶

7. *The Ratification of the Activism of the Act Rulings: Panels' Remarks and AB's Silences Pave the Way to Less Self-Restraint on the Issue of Competition Within the WTO*

Not only did the Panel take an activist stance when solving the *Act* case, it also declared openly that domestic antitrust law and restrictive business practices can be covered by WTO provisions. The Panel held that:

[T]he mere description or categorization of a measure under the domestic law as well as the policy purpose behind the measure cannot be a decisive factor in the categorization of that measure under the WTO Agreement.⁷⁷

We note that, in any event, the scope of the WTO Agreement does not exclude *a priori* restrictive business practices. Thus, the fact that the 1916 Act would be an antitrust law would not *per se* be sufficient to exclude the application of WTO rules to that law. We note that Panels under GATT 1947 and the WTO have addressed various aspects of restrictive business practices initiated by governments when such practices had the effect of impeding market access of foreign products or entry of foreign enterprises. . . . Consequently, we do not consider the dichotomy trade law/antitrust law, to the extent that it would be based on the assumption that WTO disciplines are not intended to apply to business restrictive practices, to be a limitation to the application of WTO rules and disciplines.⁷⁸

Moreover, the Panel explained that, in the case of any antitrust issue

⁷⁶ This determination is entirely consistent with the Vienna Convention, which gives pre-eminence to the text of treaties over their negotiating history. See, e.g., I. M. Sinclair, *Vienna Conference on the Law of the Treaties* 19 INT'L & COMP. L. Q. 46 (1970); Herbert W. Briggs, *The Travaux Préparatoires of the Vienna Convention on the Law of Treaties*, 65 AM. J. INT'L L. 705 (1971). However, the point here is not whether the Panel and the AB acted lawfully, but how they addressed the legislative history of the GATT and the *Anti-Dumping Agreement*. Traditionally, the judicial framework of the DSB uses the negotiating history to confirm its interpretations of legal texts. In terms of interpretation techniques, this means that when Panels and the AB can make use of the negotiating history to confirm their interpretation of the relevant texts they do it. Conversely, when the negotiating history does not support the given interpretation, the judicial framework of the DSB may avoid the *travaux préparatoire* simply by invoking Article 31 of the Vienna Convention, as it did in the *Act Decisions*.

⁷⁷ *Act Panel Report supra* note 2, at ¶ 6.100.

⁷⁸ *Id.* ¶ 6.172 n.429.

coming before the judicial framework of the DSB, the relevant issue should be whether the contested law is in conformity with the WTO regime. Whether or not this law constitutes part of the antitrust legislation of the given defendant should not be considered. Clearly, the Panel wanted to dilute the antitrust aspect of the case to highlight its WTO perspective. The Panel stated:

The United States warned the Panel of the implications of an interpretation of the price discrimination test of Article VI that would be so broad that it could make Article VI applicable to all antitrust laws when such laws address situations of trans-national price discrimination. . . .

We recall that we were requested to review the conformity of the 1916 Act with the provisions of the WTO Agreement, not to address the general issue of the relationship between trade law and antitrust law.⁷⁹

The AB's silences on appeal about the above statements are remarkable. First, as to those referring to the possibility of antitrust laws and restrictive practices as issues before the DSB, if the AB had considered such statements as having gone too far, it could have used nuance to attenuate its message. However, the AB remained silent, endorsing them.⁸⁰

⁷⁹ *Id.* ¶¶ 6.171–172. These paragraphs could be viewed as the Panel stating that its decision is pure trade jurisprudence and that it lacks any competition dimension. Obviously, the *Act Decisions* are trade jurisprudence, and nobody would expect the Panel or the AB to state they are competition decisions. However I will respond to this argument below. See *infra*, Part III.A.7.

⁸⁰ Given that the AB endorsed the Panel report, such silence is another blessing to the Panel. However, some could argue that this silence is the direct consequence of the fact that the above-mentioned findings were not appealed, based on what the AB stated in *Canada - Certain Measures Concerning Periodicals*: “[A] Panel finding that has not been specifically appealed in a particular case should not be considered to have been endorsed by the Appellate Body.” WTO Appellate Body Report, *Canada - Certain Measures Concerning Periodicals*, WT/DS31/AB/R (adopted July 30, 1997) 20 n.28. Although the AB may decide only issues that have been expressly appealed, trade lawyers know that sometimes the AB expresses its disagreement with Panel findings which have not been appealed. Perhaps one of the most telling examples is the AB report in *Turkey - Restrictions on Imports of Textile and Clothing Products*. At issue was the question of whether Panels and the AB can evaluate the consistency of the WTO on customs unions or regional trade agreements. The Panel in this case had determined that Article XXIV of the GATT could be used to examine the consistency of individual measures adopted because of customs unions of regional trade agreements, but not to evaluate the consistency of such agreements as a whole. This task, according to the *Turkey* Panel, corresponded to the Committee on Regional Trade Agreements. *Turkey - Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R. (May 31, 1999) ¶¶ 9.52 – .53 [hereinafter *Turkey - Textile Report*]. These findings were not appealed. However, the AB took the opportunity to express its disagreement and, for practical purposes, reversed the finding. The Panel maintained:

The second revealing silence refers to the broad impact of the decisions on other Members' antitrust laws governing international pricing. In some delicate disputes, when the AB desires to narrow the impact of its decision on future similar cases, it says so explicitly, as it did in a recent case, *Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products*.⁸¹

it is arguable that Panels do not have jurisdiction to assess the overall compatibility of a customs union with the requirements of Article XXIV. We are not called upon in this appeal to address this issue, but we note in this respect our ruling in *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* on the jurisdiction of Panels to review the justification of balance-of-payments restrictions under Article XVIII:B of the GATT 1994.

Turkey - Textile Report ¶ 60.

This note is among the most important statements that the AB has made in its short history, because it gave Panels and the AB jurisdiction to evaluate the overall consistency of custom unions and regional trade agreements. Indeed, the reference to its report in *India* meant that the analysis the AB made there applied in its entirety to the *Turkey* case. The dispute settlement proceedings of Article XXIII were available to determine the justification of balance-of-payment measures imposed pursuant to Article XXVIII, and such determination was not exclusive of the General Council or of the Committee on Balance of Payments. *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/AB/R. (Aug. 23 1999), ¶¶ 87, 102, 103, 106, 108 [hereinafter *India - Quantitative Restrictions AB Report*]. Thus, the examination of the overall consistency of customs unions or regional trade agreements was not a matter exclusive to a WTO political organ, namely, the Committee on Regional Trade Agreements, but for Panels and the AB as well. Both decisions were highly controversial, because some saw them as the AB's encroachment on the competences of WTO political organs. See Frieder Roessler, *The Institutional Balance between the Judicial and the Political Organs of the WTO at* <http://www.ksg.harvard.edu/cbg/Conferences/trade/roessler.htm> (last visited March 4, 2004). In favor, see William J. Davey, *Has the WTO Dispute Settlement Exceeded Its Authority? A Consideration of Deference Shown by the System to Member Government Decisions and Its Use of Issue-Avoidance Techniques*, 4 J. OF INT'L ECON. L. 79, 85–88 (2001); Claus-Dieter Ehlermann, *Six Years on the Bench of the "World Trade Court:" Some Personal Experiences as Member of the Appellate Body of the World Trade Organization*, 36 J. OF WORLD TRADE 605, 633–34 (2002).

The issue of trade and antitrust is very sensitive for the reasons explained above. Had the AB thought that the above-mentioned Panel's statements had gone too far, it could have made another note similar to that of its *Turkey* decision in order to reduce their scope. It did not, and this is why such silence is another endorsement of the Panel.

⁸¹ The AB stated:

We emphasize that we have been asked, in this appeal, to examine the measure before us—Chile's price band system—for its consistency with certain of Chile's WTO obligations. We have not been asked to examine any other measure of any other WTO Member. Therefore, we need not, and do not, offer any view on the consistency with WTO obligations of price band systems in general, or the consistency with WTO obligations of any specific price band system that may be applied by any other Member.

The AB could have stated that its *Act Decision* was limited to the *Act Decision* exclusively. Nevertheless, the AB did not make such a limitation, tacitly conveying the message that it wished its analysis to apply to other antitrust laws.

These statements and the AB's silences on appeal demonstrate that both the Panel and the AB would be willing to start a new trend, which departed from the *Act* decisions, on competition within the WTO. This is so because the AB risked an important portion of its institutional capital in this case.

Indeed, the institutional capital the AB possesses to enable it to defy the United States, or other powerful WTO Members such as the European Communities, is not unlimited, and the AB is aware of this. Garret and McCall claim, for instance, that when the United States or the European Communities appear as complainants or defendants before the AB, the AB is highly cognizant of their appearance. Although these members' appearances obviously does not mean that they will always prevail, the AB sometimes adjusts its decisions to facilitate compliance, since it dilutes opposition to the implementation of adverse rulings and enhances the AB's institutional reputation.⁸² The importance of the *Act Decisions* is that, in

WTO Appellate Body Report, *Chile - Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R. (Sept. 23, 2002), ¶ 203. Another narrowing of the scope of a decision can be found in the AB's report in *United States - Section 211 Omnibus Appropriation Act of 1998*. This was a very sensitive decision, and the AB made it clear that its report did not deal with the Member's right to expropriate intellectual property rights without compensation. See *United States - Section 211 Omnibus Appropriation Act of 1998*, WT/DS176/AB/R. (Jan. 2, 2002), ¶ 362.

⁸² These authors maintain that the:

Appellate Body has sharply altered the reasoning of many Panels, often interpreting WTO rules in a manner deferential to powerful defendants. In a series of cases challenging EU and U.S. health and environmental regulations, for example, the Appellate Body offered guidelines on how to impose trade-restrictive policies in ways that would be consistent with WTO obligations.

Geoffrey Garret & James McCall Smith, *The Politics of WTO Dispute Settlement*, at <http://www.yale.edu/leitner/pdf/1999-05.pdf> (last visited . From a more general perspective, Keohane and Nye support this view. They deem that the AB "is certain to take into account political constraints and potential opposition when making its final decision." See Steve Charnovitz, *Judicial Independence in the World Trade Organization*, 219, 237 in INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS (Laurence Boisson et al., eds., 2002) (citing Robert O. Keohane & Joseph S. Nye, Jr., *The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy*, 264, 275 in EFFICIENCY, EQUITY, AND LEGITIMACY: THE MULTILATERAL TRADING SYSTEM AT THE MILLENNIUM, (Roger B. Porter et al. eds., 2001)). But see Philip M. Nichols, *GATT Doctrine*, 36 VIRG. J. INT'L L. 454 n.429 (1996) (Arguing that the fact that consensus is required to block the adoption of Panels' and AB's reports "could create a partial *de facto* independence for the Panels and the Appellate Body, which no longer must worry about

such a delicate dispute, both the Panel and the AB decided not to show any deference to the United States. This is despite the considerable political significance the U.S. government and the U.S. Congress attach to its antitrust laws.⁸³ As well as the risk of not only receiving sharp criticism or even threats from Washington,⁸⁴ but also of ending up with the WTO judiciary's reputation impaired because of absence or delayed implementation of its rulings (as has effectively been the case⁸⁵). The only possible explanation for the fact that the *Act* Panel and the AB were determined to face these obstacles is that they were equally determined to begin stepping in on competition matters, albeit cautiously. Then it is fair to say that, in general, the *Act* decisions were written with the view to not only solving the *Act* case but also to conveying the message that the fact that antitrust cases reach the judicial framework of the DSB should in no way mean that self-restraint is imposed on it.

It is now time to deal with a number of possible objections to the interpretation of the *Act* decisions advanced in this paper in the sense that these rulings constitute hallmarks of the emerging, though cautious, WTO competition jurisprudence. One might say that the *Act* reports are not competition decisions but simply trade decisions. In other words, it could not be sustained that they are competition rulings if what they determined is that the U.S. government cannot enforce its antitrust laws. The *Act* decisions are related to competition because they expanded WTO law over a domestic antitrust issue: international predatory pricing. Therefore, a domestic antitrust matter must be resolved through the exclusive use of international trade law and no longer with remedies contemplated by domestic antitrust legislation.

A second possible objection could be that, in strict terms of competition enforcement, the *Act* decisions do not differ at all from the *Film Report*. According to this reasoning, the latter failed to provide a solution to the competition problem at issue—the anti-competitive behavior in Japan—and the former established that the U.S. antitrust remedies

crafting reports that appeal to all, or even a majority, of the members.”).

⁸³ This becomes clear once one notices the reluctance of the United States to comply with the *Act* rulings more than two years after their adoption by the DSB. For a more detailed analysis of the implementation process of this dispute see *infra* Part VII.C.1.

⁸⁴ By the time of the *Act* rulings, there had already been an attempt by certain Members of the U.S. Congress to establish a mechanism for review of Panels' and AB's decisions in anti-dumping cases. Senator Bob Dole introduced a bill, which was never passed (S.16, 104th Congress), aimed at this purpose. See Richard O. Cunningham & Troy H. Cribb, *Dispute Settlement Through the Lens of 'Free Flow of Trade'. A Review of WTO Dispute Settlement of US Anti-Dumping and Countervailing Duty Measures*, 6 J. OF INT'L ECON. L. 155, 168 (2003). Nevertheless, the AB did not hesitate to defy the United States with its *Act* ruling.

⁸⁵ See *infra* Part VII.C.1.

against international predatory pricing were illegal under the WTO. Thus, both cases ended up with no domestic antitrust enforcement. How, then, could they be deemed to have opposite approaches?

This is an erroneous interpretation of the results of these decisions. In the *Film* ruling, competition enforcement was left to Japan, which is obviously not the same as the result brought about by the *Act* decisions (where the United States was not left with the choice to face international predatory pricing). The *Act* rulings did not grant any discretion to the United States; these reports unequivocally *proscribed* a specific type of antitrust enforcement and *mandated* the use of WTO law to counteract the aforementioned anti-competitive practice. Thus, the *Act* reports are at one side of the spectrum and the *Film Report* at the other regarding domestic antitrust enforcement only.

Likewise, the key point is not whether there was antitrust enforcement but whether only WTO law must be used to solve an anti-competitive problem. The *Film Report* answered the second question in the negative, while the *Act* rulings did so in the positive. The second criticism fails to grasp this difference.

IV. THE ACTIVISM OF THE NEW APPROACH CONCERNING COMPETITION AND TRADE ISSUES: THE OTHER SIDE OF THE JUDICIAL FRAMEWORK OF THE DSB'S JURISPRUDENCE OPENLY PROTECTING PRIVATE INTERESTS

The judicial framework of the DSB may have started to adopt a complete view of private parties under the WTO, which could be the new approach. Panels and the AB have backed and strengthened a line of jurisprudence protecting private parties' interests created by past GATT practice.⁸⁶ Thus, it is understandable that the DSB has started to recognize that private companies may have to pay a price when using, or abusing, the benefits of the trading system by means of anti-competitive actions that weaken it.

A closer look reveals that the many benefits of trade liberalization pass directly to private enterprises, which enjoy the openness of new markets worldwide. First, while only member states are parties to the WTO, they enter in order to enhance opportunities for their private companies and citizens. Second, although only member states have standing before the DSB, they usually request its intervention to protect private companies or industries. Notwithstanding that in these cases member states are defending their rights formally, in reality, the benefits of a DSB ruling go straight to the private enterprises or industries involved.⁸⁷

⁸⁶ The Panel report in *United States-Sections 301-310 of the Trade Act of 1974*, synthesized this jurisprudence and developed further. *United States - Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec.22, 1999) [hereinafter *Section 301 Report*].

⁸⁷ See Bernard Speyer, *Dispute Settlement: A Gem in Need of Polish and Preservation*,

Finally, the confirmation of all these advantages is that the GATT 1947 and the judicial framework of the DSB, despite having before them disputes among States, have sometimes aimed their rulings at protecting or enhancing the ability of private enterprises in general to benefit from trade liberalization. For instance, the Panel report in *United States - Sections 301-310 of the Trade Act of 1974*, which dealt specifically with this issue, mentioned those topics where the need to protect private expectations have guided Panels under the GATT and the WTO:

It is commonplace that domestic law in force imposing discriminatory taxation on imported products would, in and of itself, violate Article III irrespective of proof of actual discrimination in a specific case. Furthermore, a domestic law which exposed imported products to future discrimination was recognized by some GATT Panels to constitute, by itself, a violation of Article III, even before the law came into force. Finally, and most tellingly, even where there was no certainty but only a risk under the domestic law that the tax would be discriminatory, certain GATT Panels found that the law violated the obligation in Article III. . .

The rationale in all types of cases has always been the negative effect on economic operators created by such domestic laws⁸⁸

Moreover, the *Section 301 Report* went even further concerning the place of private corporations within the WTO framework by creating the concept of “indirect effect” in the WTO regime by holding:

[I]t would be entirely wrong to consider that the position of individuals is of no relevance to the GATT/WTO legal matrix. Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in the national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market

275, 280 in *THE WORLD TRADE ORGANIZATION MILLENNIUM ROUND: FREER TRADE IN THE TWENTY-FIRST CENTURY* (Klauss Günter Deutsch & Bernard Speyer eds., 2001). The existence of Section 301 of the U.S. Trade Act of 1974 and the European Communities' Regulation 2641/84, known as the “New Trade Policy Instrument,” makes this point clearly. By virtue of these norms, private companies both in the U.S. and in the European Communities can ask their states to investigate trade practices taking place in other countries that violate the WTO agreements, and if such a violation is considered to exist, private companies based in the United States and Europe can exert pressure on their states to trigger WTO dispute settlement proceedings in order to get the removal of the WTO-inconsistent practices. See Yuji Iwasawa, *WTO Dispute Settlement and Japan*, 473, 484 in *NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW. ESSAYS IN HONOUR OF JOHN H. JACKSON* (Marco Bronckers & Reinhard Quick eds., 2000).

⁸⁸ *Section 301 Report*, note 86, ¶¶ 7.83-.84 (footnotes omitted).

conditions which would allow this individual activity to flourish. . . .

It may, thus, be convenient in the GATT/WTO legal order to speak not of the principle of direct effect but of the principle of indirect effect. . . .⁸⁹

Finally, the Section 301 report established that the principle of indirect effect on private parties is one of the most important reasons to condemn the existence of legislation granting Member States the power to impose trade sanctions unilaterally, even before their application.⁹⁰

As can be seen, this set of decisions set forth a jurisprudence that places considerable importance on the need to protect the interests of private companies within the WTO, despite the fact that they are not parties to the WTO. This jurisprudence also continually evolves to incorporate new characteristics, as is revealed in the creation of the principle of indirect effect in the *Section 301 Report*.⁹¹ Thus, there is a consistent and

⁸⁹ *Id.* ¶¶ 7.73 and 7.7 (footnotes omitted). The Report also displays the consequences of this principle—the possibility of challenging legislation as such before the DSB, even before any WTO-inconsistent application thereof. *See id.* ¶¶ 7.80–81.

⁹⁰ The Panel said:

[I]t may have been plausible if one considered a strict Member-Member matrix to insist that the obligations in Article 23 do not apply to legislation that threatens unilateral determinations but does not actually mandate them. It is not, however, plausible to construe Article 23 in this way if one interprets it in the light of the indirect effect such legislation has on individuals and the market-place, the protection of which is one of the principal objects and purposes of the WTO. . . .

[A] law reserving the right for unilateral measures to be taken contrary to DSU rules and procedures, may – as is the case here – constitute an ongoing threat and produce a ‘chilling effect’ causing serious damage in a variety of ways. . . .

[T]here is the damage caused to the market-place itself. The mere fact of having legislation the statutory language of which permits conduct which is WTO prohibited – namely, the imposition of unilateral measures against other Members with which it is locked in a trade dispute – may in and of itself prompt economic operators to change their commercial behavior in a way that distorts trade. Economic operators may be afraid, say, to continue ongoing trade with, or investment in, the industries or products threatened by unilateral measures. Existing trade may also be distorted because economic operators may feel a need to take out extra insurance to allow for the illegal possibility that the legislation contemplates, thus reducing the relative competitive opportunity of their products on the market. Other operators may be deterred from trading with such a Member altogether, distorting potential trade. . . . The threat of unilateral action can be as damaging on the market-place as the action itself.

Id. at ¶¶ 7.86, 7.88 –90.

⁹¹ *See* Section 301 Report, *supra* note 87.

developing trend molded by Panels and the AB that gives them additional advantage in developing their competition jurisprudence and forces private parties to pay a price for benefiting from the trading system. In other words, because of the existence and consolidation of the abovementioned WTO jurisprudence, private undertakings abusing the trading system *might* see Panels and the AB adopting decisions aimed at preventing such abuse.

Obviously, this does not mean that the judicial framework of the DSB will transform private companies into subjects of the WTO. Rather, the WTO will remain a regime that creates rights and obligations only for states. However, if the *right* cases arrive before such a judicial body, that body might not be deterred by the fact that its decisions may *affect* given private parties and, specifically, certain anti-competitive activities in which they are involved.⁹²

V. COEXISTENCE OF THE *FILM REPORT* AND THE *ACT DECISION* APPROACHES CONCERNING COMPETITION AND TRADE WITHIN THE WTO

The approach of the *Film Report* Panel will coexist with the *Act Decisions* Panel as to competition matters inside the WTO for the very reason that the former was endorsed by the AB in its report *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*.⁹³ This report stated, "Like the Panel in *Japan - Measures Affecting Consumer Photographic Film and Paper*, we consider that the remedy in Article XXIII:1(b) 'should be approached with caution and should remain an exceptional remedy'."⁹⁴ The scope of this provision in dealing with competition matters is extremely narrow.

However, the coexistence of the self-restraint of the *Film Report* ruling and the activism of the *Act Decisions* rulings does not refer to two different WTO mechanisms of access to the DSB, or that the former will apply to non-violation nullification and impairment cases and the latter to those brought through direct violation disputes. Rather, one could expect that the self-restraint approach will go beyond non-violation cases because member states did not create the WTO framework to deal broadly with such matters,

⁹² This is not to suggest that every time there is a case before the judicial framework of the DSB involving private anti-competitive behavior and Members' direct involvement in it, Panels or the AB will overtly or covertly use the above-mentioned jurisprudence to force the defendant member to either eliminate or attenuate the consequences for international trade of such private behavior. The *Film Report* case clearly contradicts this. There, there were clearly identified private multinationals on the defendant side (and on the complaining side too). Despite this, the Panel did not interpret WTO law in a way that would have forced Japan to modify its multinationals' conduct.

⁹³ *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter *Asbestos AB Report*].

⁹⁴ *Id.* ¶ 10.86 (quoting *Japan - Measures Affecting Consumer Photographic Film and Paper*).

and some members would not tolerate rampant activism on the part of Panels and the AB. As has been mentioned, the DSB is a highly political body.⁹⁵ This imposes restrictions on Panels and the AB, as well as a need for conservative interpretations of WTO provisions aimed at preserving the agreement between the member states. Occasionally, Panels and the AB feel strong enough to push WTO rules beyond what Member States negotiated, as the *Act Decisions* rulings indicate, but this situation is an exception.⁹⁶

Finally, the tension between the *Film* and the *Act* approaches are expressed in two different ways. First, the tension may be present in single decisions, as was the case with *Bovine Hides*, which left traces of both orientations.⁹⁷ Yet the tension may be viewed from the general perspective of the WTO competition jurisprudence as a whole. For instance, the self-restraint of the *Film Report* was first, followed by the activism of the *Act* decisions. Later, the AB endorsed the approach of the *Film Report* in its *Asbestos* decision. Finally, the *Bovine Hides* report was neither entirely

⁹⁵ Traditional accounts of the DSB do not depict clearly all the politics involved in its operation. First, politics might start even before consultations are requested. For instance, members might agree not to take certain disputes to the DSB, as was the case in the dispute between the United States and the European Communities regarding the Helm Burton Act. Garret & McCall suggest that this agreement comprised many other disputes, but that it was breached by the United States with its claims in *European Communities - Regime for the Importation, Sale and Distribution of Bananas* and *EC - Measures Concerning Meat and Meat Products*. See Garret & McCall, *supra* note 82. Second, the consultation stage involves politics as well, since the parties attempt to reach an agreement. Third, politics are present even at the Panel stage with the possibility of negotiating a satisfactory solution even if the Panel has been constituted. Fourth, when Panel and AB reports are submitted to the DSB for adoption, politics are involved. Members use this scenario to advance their agendas by expressing their agreement or disagreement with the Panel or AB decision. The fact that the DSB adopts reports almost automatically does not mean that Panels or the AB are deaf to the debates their reports engender. Members know this and clearly state it. For instance, in its 2002 Report to the U.S. Congress, the Secretary of Commerce expressed that the "The United States will continue to work to communicate the United States' concern clearly to Panels and the Appellate Body. . . . The tools available for these purposes include submissions to Panels and the Appellate Body, comments on the proposed findings of Panels, and discussions of any finding at the DSB." U.S. Secretary of Commerce, *Executive Branch Strategy Regarding WTO Dispute Settlement Panels and Appellate Body. Report to the Congress Transmitted by the Secretary of Commerce*. Dec. 30, 2002. For a general comment regarding the possibility of DSB's debates influencing the AB, see Steve Charnovitz, *supra* note 80, at 237. Fifth, the implementation process is also full of politics, given the discretion losing Members enjoy to adjust the given measures in order to comply with the DSB ruling. In general, implementation also comprises negotiations between the parties to the dispute. See Garret & McCall, *supra* note 82; Chy Carmony, *Remedies and Conformity under the WTO Agreement*, 5 J. INT'L ECON. L. 307 (2002). Thus, there is virtually no stage within the dispute settlement process lacking politics.

⁹⁶ See *infra* note 231 for controversial rulings where the AB went beyond the texts of WTO law.

⁹⁷ See Part VI, *infra*.

activist nor self-restrained.⁹⁸ Hitherto, it seems as though the judicial framework of the DSB were trying to strike a balance between both approaches, thereby helping WTO competition jurisprudence to evolve without generating too much resistance.

VI. IN THE AFTERMATH OF THE ACT RULINGS: ARGENTINA - MEASURES AFFECTING THE EXPORT OF BOVINE HIDES AND THE IMPORT OF FINISHED LEATHER: THE *FILM REPORT* AND THE *ACT DECISIONS* APPROACHES COMBINED

The first decision after the *Act Decisions* was the *Bovine Hides Report*, which demonstrated that WTO competition jurisprudence, even that based on direct violation, evolves among a tension between the *Film* and the *Act* approaches.⁹⁹ The case stemmed from a European Communities claim alleging that Argentine Resolution 2235 ("Resolution"), allowing the presence of representatives of the Association of Industrial Producers of Leather, Leather Manufactures and Related Products ("ADICMA"), in the export process of bovine hides, an obviously vital output of its products, violated Article XI(1) and Article X(3)(a) of the GATT.¹⁰⁰

Argentina adduced that the reason for the presence of ADICMA representatives in the export process of bovine hides was to make sure that the tariff heading corresponded with the description of the goods and that the duties and charges proposed were correct.¹⁰¹ The Resolution did not provide the representatives with the right to stop or delay shipments of bovine hides.¹⁰² In the case of disagreement between ADICMA representatives and any given customs officer, they had to submit a complaint or to go before a court alleging criminal offences.¹⁰³

A. The Panel's Analysis of the Violation of Article XI(1).

The European Communities attempted to show that exports of bovine hides were substantially lowered because of the presence of ADICMA representatives in the export process of such hides.¹⁰⁴ The European Communities argued that the Resolution constituted an export restriction contrary to Article XI.¹⁰⁵ They argued that the Argentine tanning industry

⁹⁸ See *infra* Parts V.1.C.1 and V.1.C.2.

⁹⁹ There is no such tension as to non-violation nullification and impairment cases. They will be solved with the *Film Report* approach, now that it has been ratified by the AB in its *Asbestos AB Report*. See text accompanying note 89.

¹⁰⁰ See *Bovine Hides Report*, *supra* note 3, ¶ 3.1

¹⁰¹ See *id.* ¶ 3.41.

¹⁰² See *id.* ¶ 3.44.

¹⁰³ See *id.*

¹⁰⁴ See *id.* ¶ 4.63.

¹⁰⁵ See *id.* ¶ 3.1.

had successfully pressed Argentina's government to set export restrictions on bovine hides in a policy going back to the 1970s.¹⁰⁶ Initially there was a prohibition on the export of bovine hides (1972–1979), which was then transformed into an export tax as result of a US § 301 investigation.¹⁰⁷ This was followed by a suspension of exports (1985–1992); a new duty of 15%, (abolished in 1993); and finally, the Resolution, contemplating the presence of ADICMA representatives in the export process of bovine hides, which coexisted with another export tax.¹⁰⁸

The European Communities presented three different arguments to contest the Resolution as violating Article XI(1). First, the mere presence of ADICMA representatives constituted an export restriction on bovine hides. Second, the representatives and access to confidential information on slaughterhouses (*frigoríficos*)¹⁰⁹ implied an export restriction. Third, the representative's access to confidential information by a cartel in the tanning industry, operated as an export restriction of bovine hides.

As this was all circumstantial evidence, the Panel first set the standard of proof that the European Community had to meet in order to demonstrate a *prima facie* violation of Article XI(1). The Panel maintained that it:

[C]annot, consistently with its obligation to make an objective assessment of the matter before it, draw inferences from the circumstantial evidence placed on record, unless that evidence clearly and convincingly sustains the complainant's suggested conclusion.¹¹⁰

The Panel rejected the first claim (that there was an export restriction on bovine hides because of the Resolution and of the presence of representatives of the tanning industry) holding:

It seems to us that the exports of hides from Argentina may be lower than what could normally be expected. This is particularly so in light of the evident price premium that *frigoríficos* could obtain by exporting even taking into account the export duties. We recognize that there almost certainly are higher costs in exporting rather than selling domestically, although the 20 percent cited by Argentina may be too high. There may also be some quality differences, but we do not think the evidence supports Argentina's contention that the differences are dramatic.... But that is not enough to show that there are export restraints or, if there were, that *this* measure in dispute is the way in

¹⁰⁶ See *id.* ¶ 11.46

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ The Panel treated as synonyms the following expressions: slaughterhouses, *frigoríficos*, and meat-packing plant. See *id.* ¶ 3.2.

¹¹⁰ *Id.* ¶ 11.28 (footnotes omitted).

which such export restriction is “made effective.”¹¹¹

Next, the Panel went on to evaluate the second claim, that there was an export restriction on bovine hides provoked by the presence of ADICMA representatives within the export procedures of bovine hides, specifically, by their access to slaughterers’ confidential information. The Panel rejected this claim:

[D]oes the revelation of this information along with the presence of ADICMA personnel result in prohibited export restrictions? Again. . . we are drawing inferences from circumstantial evidence. In the absence of additional evidence, we remain unconvinced that releasing such information in and of itself necessarily leads to export restrictions . . .¹¹²

The Panel believed that the level of exports of bovine hides was low, but that such a level was not explained by the presence of ADICMA representatives or by the combination of their presence and access to some slaughterers’ confidential information.

1. The Bovine Hides Report Panel’s Decision Regarding the Antitrust Claim

Having rejected the first two claims, the Panel concluded their analysis, by addressing the the European Communities’ antitrust claim. They asserted that there was a cartel in the Argentinean tanning industry, whose objectives was to curb exports of bovine hides, and that slaughterers have strong reasons not to export bovine hides for fear of losing their domestic customers, ADICMA members. In the European Communities’ view, the Resolution constituted the tool to make this export restriction effective.¹¹³

Here, the Panel qualified further the standard of proof regarding circumstantial evidence. As has been mentioned, the first two claims were evaluated with a clearly and convincing evidence standard. Here, the Panel went further by holding that circumstantial evidence needed to be strong enough to eliminate other reasonable alternatives explaining the facts.¹¹⁴

¹¹¹ *Id.* ¶ 11.29.

¹¹² *Id.* ¶ 11.42.

¹¹³ *See id.* ¶¶ 11.42, 11.47.

¹¹⁴ The Panel maintained the following:

[W]e are in the situation described in the previous Section where we are drawing inferences from circumstantial evidence. The question is whether such circumstantial evidence clearly and convincingly leads us to the conclusion proposed by the complainant and, effectively, no other. . . .

Thus, the standard of proof for circumstantial evidence to meet in order to demonstrate the existence of a private restrictive practice, comprises two steps, according to the *Bovine Hides Report*. First, the evidence must lead to the conclusion that the given practice is in place. Second, the evidence must eliminate other reasonable alternatives questioning the existence of the private practice.¹¹⁵

This standard of proof is higher than that of the objective assessment contemplated by Article 11 of the DSU.¹¹⁶ Indeed, while the AB has prudently refrained from defining “objective assessment of the facts” with precision, a definition that would be quite difficult to apply successfully to all types of cases, it has indicated what “an objective assessment” is not. In *EC - Measures Concerning Meat and Meat Products*, the Appellate Body stated:

[T]he 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 facts. “Disregard” and “distortion” and “misrepresentation” of the evidence, in the ordinary signification in judicial and quasi-judicial processes, imply not simply an error of judgment in the appreciation of evidence but rather an egregious

[R]easonable alternatives must be eliminated....

Id. ¶¶ 11.42, 11.51 (footnotes omitted).

¹¹⁵ From the parties’ perspectives, this standard of proof contemplates a defense in favor of complaining member states. Members can posit reasonable explanations for the presence of the circumstantial facts that complaining members mention as attributable only to the existence of a restrictive practice, to place the burden of proof on claiming Members who now must rebut such reasonable explanations. If they fail to do so, the Panel will assume that a *prima facie* violation has not been demonstrated.

¹¹⁶ Article 11 of the DSU set forth:

Functions of Panels

The function of Panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, 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, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

error that call into question the good faith of the Panel.¹¹⁷

In general, reasonableness is the direct result of an evaluation of fact made in a way that does not distort, disregard, or misrepresent them. Thus, if after having evaluated the facts of the case, a Panel reaches conclusions that are reasonable, it can embrace such conclusions regardless of whether there is another plausible interpretation of the same facts put forward by the defendant Member. The conclusion must be the result of a comprehensive evaluation, which cannot be considered a distortion or misrepresentation of the factual situation put before the Panel.¹¹⁸ Article 11 of the DSU does not impose “perfection” as the standard regarding circumstantial evidence, as the *Bovine Hides Report* Panel understood. An objective evaluation of the facts does not mean a perfect, unquestionable account of them, able to overcome all other possible descriptions. Rather, as the AB stressed in its above-mentioned report, the standard regarding objective evaluation of the facts of the case means neither more nor less: a description of the factual situation that is neither a distortion nor a misrepresentation thereof, nor the result of a partial evaluation of the proofs.¹¹⁹

Within the framework of this standard of proof, the Panel tacitly¹²⁰ established that the European Community had to demonstrate first that there was a private restrictive practice. Second, the existence of this practice was attributed to the defendant Member’s direct involvement. Third, there was an export restraint. Fourth, there was a causal link between the practice and the export restriction, in this case, operating through the Resolution.¹²¹

¹¹⁷ *EC - Measures Concerning Meat and Meat Products*, WT/DS26/AB/R (Jan. 16, 1998), ¶ 133.

¹¹⁸ Obviously, save in the case of claims related to the *Anti-Dumping Agreement* where by virtue of its Article 17.6(ii) Panels have to respect members’ objective evaluation of facts even if they would have reached a different conclusion. See, e.g., *United States - Anti-Dumping Measures On Certain Hot-Rolled Steel Products From Japan*, WT/DS184/AB/R (July 24, 2001), ¶¶ 50–70 [hereinafter *Hot-Rolled Steel AB Report*]. Vermulst and Graafsma suggest that Article 17.6(ii) has had little impact on how anti-dumping cases have been decided. See Edwin Vermulst & Folkert Graafsma, *WTO Dispute Settlement with Respect to Trade Contingency Measures: Selected Issues*, 35 J. WORLD TRADE 209, 211 (2001).

¹¹⁹ The Panel did not cite any previous WTO ruling in support of this approach, nor do post-AB reports seem to adopt this line of reasoning. Indeed, one of the most recent AB rulings on Article 11 of the DSU preserves the general view of not constraining Panels in their evaluations of facts and law beyond what Article 11 called objective evaluation. See, e.g., *Hot-Rolled Steel AB Report*, *supra* note at 113, ¶ 54.

¹²⁰ The *Bovine Hides Report* Panel did not make general findings regarding the content of the burden of proof of the case, but evaluated each of these requirements based on the factual record of the dispute. It is then by way of inference that this author states in this paragraph the content of the European Community’s burden of proof.

¹²¹ An analysis of such requirements will be made below when exploring the different possibilities of WTO competition jurisprudence. See *infra* Part VII.C.2.(a). Given that the sole purpose here is to disentangle the *Film Report* and the *Act Decisions* approaches of the

Regarding the existence of the cartel, nobody, neither the Argentinean meat packing industry—the one most harmed by the supposed cartel¹²²—nor the European Community, far away from the place of the events that were strictly domestic in character,¹²³ nor the Panel, which felt that it could not grasp the whole picture of the real facts as to the existence of an export restriction, seemed to possess direct evidence of it, including its competition dimension. The Panel stated:

[W]e felt that there were facts of which we were not aware and which might be of importance and, therefore, we have not been fully satisfied that we have had a truly comprehensive view of some aspects of the situation.¹²⁴

On this basis, the Panel stated that there was insufficient proof of the existence of the cartel in the tanning industry:

In our view, it is possible that a government could implement a measure which operated to restrict exports because of its interaction with a private cartel. . . .

The evidence before us is quite thin. We have a newspaper article and opinion piece, a press release from the *frigoríficos* and a statement by a member of the *Congreso de la Nación*. Such evidence would certainly not support a case in a domestic court. While it may be an open question whether the same quantum of evidence is necessary to support such allegations in a WTO dispute under Article XI of the GATT 1994, surely the difference cannot be that great. What is clear is that whatever level of proof may be required, it was not reached here.¹²⁵

What followed was a succession of weak evidence regarding the three other key requirements to demonstrate the *prima facie* violation of Article XI(1). Indeed, the Panel stated that the proof of the Argentinean

Bovine Hides report it is not necessary to incorporate such analysis at this moment.

¹²² The President of the Argentine Meat Packers' Association (*Asociación de Frigoríficos de la Argentina*) declared: "We have no concrete evidence of the existence of market agreements among tanners." *Bovine Hides Report*, *supra* note 3, ¶ 4.93.

¹²³ The facts of this case differ substantially from cases where the extraterritorial enforcement of national antitrust laws is possible. In the latter, cartels operating from foreign countries have commercial activity in the overseas market they are injuring with their anti-competitive behavior, which make it possible for the antitrust authorities to gather a certain amount of information regarding what is going on in their market. In the *Bovine Hides Report* dispute, the supposed tanning cartel operated only in Argentina, with no presence at all in the European market. This made it very hard for the European Community to clearly prove its existence.

¹²⁴ *Bovine Hides Report*, *supra* note 3, ¶ 11.14.

¹²⁵ *Id.* ¶¶ 11.51, 11.52.

government's involvement with the existence of the cartel was necessary—proof not submitted by the European Community—and concluded that the causal link between the cartel, the Resolution, and any export restriction was not demonstrated.

[E]ven if we were to agree that there were a cartel operating in this industry, there is simply no proof that Resolution 2235 is what is causing (or making effective) the export restriction.¹²⁶

Finally, the Panel found that the European Community's legal arguments had not proven the violation of Article XI(1). The Panel also stated that Article XI itself does not impose a duty on Member States to prevent the existence of private practices restraining exports. The Panel said:

[T]here is no obligation under Article XI for a Member (Argentina in this instance) to assume a full "due diligence" burden to investigate and prevent cartels from functioning as private export restrictions.¹²⁷

The Panel then concluded that there was insufficient evidence of "an export restriction made effective by the measure in question within the meaning of Article XI(1) of the GATT 1994."¹²⁸

B. The Panel's Analysis of the Violation of Article X(3)(A)

The European Community also attacked the Resolution by alleging that it was an unreasonable and partial administration of customs law and regulations, and thereby violated Article X(3)(A) of the GATT 1994, according to which, "[e]ach contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article."¹²⁹ The Panel

¹²⁶ *Id.* ¶ 11.54.

¹²⁷ *Id.* ¶ 11.52. Although the Panel did not declare the existence of the cartel in the tanning industry, it did believe that the existence of such a cartel was probable and so stated it twice. *See infra* Part VI.C.2.(a).

¹²⁸ *Id.* ¶ 11.55.

¹²⁹ Paragraph 1 of Article X provides:

Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements or restrictions or prohibitions on imports or exports or on the transfer of payment therefore, or affecting their sale, distribution, transportation, insurance, warehousing inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any other contracting party shall also be published. . . .

upheld all the European Community's arguments regarding this claim. As to reasonableness, the Panel said:

[i]n our view, the analysis of this issue with respect to reasonableness then will turn on the information that is supplied to ADICMA representatives and its direct relevance to the product classification question. . . . [I]t is unreasonable to allow ADICMA representatives into the Customs clearance process in light of the access to information that it affords. . .

To provide some specific examples, ADICMA representatives should not be able to see the pricing information of the suppliers to ADICMA's members. This is information which ADICMA members could use to their commercial advantage in negotiations with the frigoríficos.... We also see no need for them to be made aware of the destination or quantities involved as these data are irrelevant to the tasks ADICMA representatives are involved in.¹³⁰

We think it is particularly important for the reasonable administration of Argentina's export laws that the tanners not be provided the name of exporters. . .

Therefore, we must conclude that a process aimed at assuring the proper classification of products, but which inherently contains the possibility of revealing confidential business information, is an unreasonable manner of administering the laws, regulations and rules identified in Article X:1 and therefore is inconsistent with Article X:3(a).¹³¹

Finally, regarding impartiality, the Panel endorsed the previous European Community's approach and ruled that:

[A]DICMA, in fact, represents an adverse commercial interest in that the exports are not in its members' interests as such exports potentially drive up the costs of hides. Furthermore, ADICMA members are competitors of the foreign buyers of the hides.

Much as we are concerned in general about the presence of private parties with conflicting commercial interests in the Customs process, in our view the requirement of impartial administration in this dispute is not a matter of mere presence of ADICMA representatives in such processes. It all depends on what that person is permitted to do. In our

¹³⁰ For a general description of ADICMA's tasks, see *supra* text accompanying note 96.

¹³¹ *Bovine Hides Report*, *supra* note 3, ¶¶ 11.91–.94.

view, the answer to this question is related directly to the question of access to information as part of the product classification process as discussed in the previous Section. . . .

Whenever a party with a contrary commercial interest, but no relevant legal interest, is allowed to participate in an export transaction such as this, there is an inherent danger that the Customs laws, regulations and rules will be applied in a partial manner so as to permit persons with adverse commercial interests to obtain confidential information to which they have no right.

[T]herefore, Resolution 2235 cannot be considered an impartial administration of the Customs laws, regulations, and rules described in Article X:1 and, thus, is inconsistent with Article X:3(a) of the GATT 1994.¹³²

C. Disentangling the Approach of the *Bovine Hide* Panel

The *Bovine Hides* report is not as activist as the *Act* decisions; thus, it is not easy to unravel the Panel's interpretive strategies and its approach when deciding each claim. However, the Panel left traces of its state of mind that make it possible to infer that the approach of the *Bovine Hide* Panel is a mixture of the *Film* and the *Act* approaches.

1. Disentangling the Film Approach of the *Bovine Hides* Report

The Panel used the *Film* approach when deciding the antitrust claim of violation of Article XI—and not because the Panel rejected the claim. The antitrust claim had limited chances of success. Indeed, even if the Panel had declared the existence of a cartel in the tanning industry, such a declaration would not have altered the decision rejecting the antitrust claim.

Indeed, after having declared the existence of the cartel in the tanning industry, the Panel could have gone in one of two directions, both of which would have been rejected. The first would be to declare that the Argentinean government was involved in the existence of the cartel and was therefore liable. The second would be to say that the Argentinean government was not involved, but that the members of the European Community had a duty of due diligence to prevent the existence of restrictive practices of this type. Thus, the declaration of the presence of the cartel would have made the government of Argentina responsible.

Neither alternative was possible. First, the Argentinean government's involvement in the existence of the cartel was not proved, so the cartel's

¹³² See *id.* ¶ 11.51.

actions did not make Argentina liable.¹³³ Second, the Panel said that Article XI does not impose a duty of due diligence on Member States to prevent the existence of cartels restraining exports.¹³⁴ Thus, as Argentina did not have a duty to prevent the cartel's existence in the tanning industry, declaring the cartel's existence did not lead to holding Argentina responsible for a violation of Article XI.

Knowing that the declaration of the existence of the cartel would not have any meaningful consequence on the final decision, and that the whole case would be decided on the basis of Article X(3)(a), the Panel could have made general statements regarding the antitrust claim to establish the four requirements that the European Communities had to prove. The Panel could also have rejected the Article XI claim based on the lack of Argentina's involvement with the cartel and absence of any duty imposed on it to prevent the existence of private cartels operating as export restraints. Instead, the Panel decided to increase the standard of proof regarding the antitrust claim.¹³⁵

Sophisticated adjudicators do not speak without purpose. The *Bovine Hides* Panel knew that its final decision would be the same with or without such a high standard of proof; the Panel was also aware of the fact that by setting this standard of proof, it would produce *Film*-type effects on both future complaining Members and future Panels dealing with private restrictive practices. For future complaining Members, the message conveyed by the *Bovine Hides* Panel is that a case dealing with a private restrictive practice and based on circumstantial evidence must be strong to the point where it is nearly infallible. This standard of proof makes competition litigation harder, particularly in cases involving private restrictive practices and violation of WTO non-competition provisions.¹³⁶ On the other hand, knowing this standard allows complaining Members to better assess the merits of their cases and the opportunity to put them before the DSB. Members now know that they have to gather substantial evidence regarding the requirements to demonstrate a *prima facie* violation of non-

¹³³ See *id.* ¶ 11.51.

¹³⁴ See *supra* text accompanying note 122.

¹³⁵ See *id.* and accompanying text. This is not to suggest that the burden of proof of private restrictive practices should be lightened in WTO cases, but simply to highlight the fact that the *Bovine Hides* Panel made this statement not to decide the case, but to try to enlighten future Panels who will analyze the proof of such practices. Again, future Panels may use this argument from the *Bovine Hides Report* to justify very strict requirements of the burden of proof on claimant Members in cases involving private restrictive business practices.

¹³⁶ See *infra* Part VII.A. WTO non-competition provisions are those that do not deal explicitly with competition issues, for example, Article XI. These provisions differ from WTO competition provisions, because in the latter case, WTO law deals expressly with competition matters. This categorization will be presented in detail below.

competition provisions before taking their cases to the DSB.

The effects of the standard of proof in the *Bovine Hides* report on future Panels can be anticipated easily. A future Panel using the *Film* approach would declare that either, (1) the private restrictive practice, (2) the government involvement, (3) the trade distortion or, (4) the causal link between the distortion and the practice was not demonstrated. Therefore, the result would be the rejection of the antitrust claim and the denial of the WTO remedy for the competition problems brought forward by the complaining Member. In other words, a future Panel using the *Film* approach would be able to use the standard to justify its self-restraint.

For a future Panel employing the *Act* approach, this statement might not be significant. A Panel may state that its duty is to evaluate the case objectively, as Article 11 of the DSU orders it to do; the Panel may proceed without any reference to such a statement, or may distance itself from the latter by narrowing its scope to antitrust claims regarding violations of Article XI.

In sum, the fact that the *Bovine Hides* Panel unnecessarily raised the standard of proof and set a precedent that future Panels may draw on to justify self-restraint indicates that its approach when deciding the claim of violation of Article XI mirrors that of the *Film Report*. The Panel was unwilling to provide a WTO remedy for competition complaints.

2. Untangling the Act Approach of the Bovine Hides Panel

(a) The Beliefs of the Bovine Hides Panel

Despite the fact that the Panel rejected the claim of violation of Article XI(1), its report indicates that the Panel reached three significant conclusions. The first, which the Panel referred to twice, was that exports of bovine hides from Argentina were low.¹³⁷ The second conclusion the Panel reached was that the existence of the cartel in the tanning industry was possible and that it was probably a price fixing agreement. In fact, the Panel explicitly accepted this when it stated, “[i]t is possible that there is a cartel operating among the tanners. It is possible that they collude to set prices.”¹³⁸ However, the Panel’s third conclusion was that Argentina was not involved in the existence of this cartel, so if the cartel was limiting exports, it was through mechanisms other than the Resolution. The Panel expressed that “it is entirely possible to conclude that such an export limiting cartel could operate wholly independently of this measure [the Resolution].”¹³⁹

¹³⁷ *Bovine Hides Report*, *supra* note 3, ¶¶ 11.29, 11.50.

¹³⁸ *Id.* ¶ 11.49.

¹³⁹ *Id.* ¶ 11.54.

The Panel's belief that there was a cartel in the tanning industry fixing prices of bovine hides and operating independently of the Resolution to restrict exports of such hides was relevant when the Panel evaluated whether the presence of representatives of such a likely cartel conformed with Article X(3)(a). The analysis of this claim had a competition perspective,¹⁴⁰ which played a role in the Panel's decision: the *Bovine Hides* Panel sought to reduce ADICMA representatives' role in the export process of these hides, and interpreted WTO law towards this end.¹⁴¹

(b) The Claim of Violation of Article X(3) and the *Act* Approach of the
Bovine Hides Panel

The impact of the Panel's antitrust conclusions on the decision of the claim of violation of Article X(3)(a) is revealing with regard to the requirements of impartiality and reasonableness in the application of Argentina's laws and regulations. From the text of its report, it is possible to infer that the *Bovine Hides* Panel sorted out this claim using the *Act* approach and sought to give it a WTO solution: reducing the scope of the presence of ADICMA representatives within the export process of bovine hides, for what the Panel considered was a likely anti-competitive practice.

Traces of the *Act* approach existed in the *Bovine Hides* report regarding the declaration of WTO inconsistency of the Resolution for not being reasonable and impartial, as ordered by Article X:3(a). This Resolution was inconsistent because it allowed ADICMA representatives to have access to confidential information. The *Bovine Hides* Panel had to stretch the scope of Article X.1 over the above-mentioned provision to declare such inconsistency.

¹⁴⁰ Without this recognition, the evaluation of the claim of violation of Article X(3)(A) would have been an exclusive matter regarding reasonableness and impartiality in the application of Argentinean customs law and regulations.

¹⁴¹ *Bovine Hides Report*, *supra* note 3, ¶ 11.99 n.308. To be fair to the *Bovine Hides* Panel, it separated its conclusion of the violation of Article XI(1) from the violation of Article X(3)(A). In fact, when examining the latter, the Panel stated:

In this regard, we recall that we are not dealing under this Article [X(3)(A)] with export restraints. We already decided in the previous Section that the allegations of such restraints within the meaning of Article XI imposed through RG 2235 remain unproved. Thus, any chilling effect with respect to the exports themselves has not been established. . . .

Id. ¶ 11.99 n.308. This statement, though, does not rule out the assumption that the evaluation of the claim of violation of Article X(3)(A) had a competition perspective. It only indicates that the Panel is not analyzing the claim from the point of view of a Resolution restraining exports *within the meaning of Article XI*, which obviously does not prevent the Panel from examining the claim from the perspective of a Resolution allowing the presence in the export of bovine hides of a likely cartel fixing prices of such hides and operating independently of the Resolution to stifle their exports.

The argumentation leading to the WTO-inconsistency of the Resolution highlighted the fact that Article X's objective, when dealing with the duty to publish all customs regulations, was the need to allow "[m]embers and traders to become acquainted with them."¹⁴² The Panel attached considerable importance to this goal, in favor of traders, when it stated: "[w]hile it is normal that the GATT 1994 should require this sort of transparency between Members, it is significant that Article X:1 goes further and specifically references the importance of transparency to individual traders."¹⁴³

From this statement, the Panel began to interpret Article X:3(A), stating that "it can be seen that Article X:3(a) requires an examination of the real effect that a measure might have on traders operating in the commercial world. It can involve an examination of whether there is a possible impact on the competitive situations due to alleged partiality, unreasonableness or lack of uniformity in the application of customs rules, regulations, decisions, etc."¹⁴⁴ Having said this, the *Bovine Hides* Panel concluded that it did not "see why ADICMA representatives must have access to such information, which by its nature is confidential,"¹⁴⁵ and declared that on these grounds the Resolution was unreasonable.¹⁴⁶

The previous statements permit an inference that from the duty to publish customs regulations and the obvious consequence that such a duty favors traders, the *Bovine Hides* Panels extracted a new rule: the application of customs regulation cannot affect the competitive situations of traders operating in the commercial world. While it is hard to disagree with such a rule, it is less evident that the rule emanates clearly and expressly from Article X.3(A). On the contrary, the rule is a clever *stretching* of Article X.1 to cover the former precept.

Indeed, the very text of Article X:3(a) would explicitly not mandate the evaluation of reasonableness, impartiality, and uniformity in the application of customs regulations in terms of their impact on the competitive relations of traders operating in the real world. This would be so because Article X:3(a) refers only to Members and does not mention traders.¹⁴⁷ This line of reasoning could be another possible interpretation of

¹⁴² *Id.* ¶ 11.76.

¹⁴³ *Id.*

¹⁴⁴ *Id.* ¶ 11.77.

¹⁴⁵ *Id.* ¶ 11.91.

¹⁴⁶ *Id.* ¶ 11.94.

¹⁴⁷ GATT/1994, *supra* note 14, at arts. X.1 and X.3(a). It could be said that Article X.1 covers Article X.3(a) because the latter expressly refers to the former. The reference states that the customs regulations mentioned in Article X.1 are the ones that must be applied in reasonable, uniform, and impartial ways. The reference does not go beyond that. Thus, the rule that Article X.3(a) "can involve an examination of whether there is a possible impact on the competitive situations due to alleged partiality, unreasonableness or lack of uniformity in

Article X:3(a), which could find solid grounds in the well-established principle of interpretation set by the AB, according to which neither Panels nor the AB itself can “read into the text words which are simply not there.”¹⁴⁸ The question is, why did the *Bovine Hides* Panel stretch the reference to traders in Article X.1 over Article X.3(a), despite the existence of this WTO principle of interpretation? The answer is that the Panel’s belief that ADICMA operated as a cartel demanded such stretching. It was a result-oriented interpretation.

Indeed, the *Bovine Hides* Panel believed that ADICMA was a price-fixing cartel, operating independently of the Resolution. It went even further, openly stating, “It remains unclear to us why the tanners are the only industry that has the right to send representatives to participate in the Customs clearance of their suppliers’ exports and for which the Argentinean government requires such expertise.”¹⁴⁹ It does not come as a surprise that the *Bovine Hides* Panel stretched the scope of Article X.1 over Article X:3(a) in order to get the result of WTO-inconsistency of the Resolution and avoid any interpretation that, although plausible in principle, would lead to a different result.

Thus, the first trace of the *Act* approach found in the decision of the *Bovine Hides* Panel was the way the Panel framed the evaluation of the claim of violation of Article X.3(A).¹⁵⁰ This framing allowed the Panel to make the reference to traders in Article X.1 play a decisive role in such an evaluation. This role is evident once one assesses this interpretation in light of the facts of the case, but it is not in purely abstract terms.

The stretching of Article X.1 set the stage for the declaration of inconsistency within Article X.3(A) for lack of reasonableness and impartiality. It is in the analysis of this latter requirement that the *Bovine Hides* Panel again left evidence of its use of the *Act* approach.

As was seen, the Panel determined that “there is an *inherent* danger that the Customs laws, regulations and rules will be applied in a partial

the application of customs rules, regulations, decisions, etc” is a rule rooted in an expansive interpretation of Article X.1 and X.3(a) seen together. However, their texts result in such a rule. It is a rule created by the *Bovine Hides* Panel to reach an objective: declaring the WTO inconsistency of the Resolution.

¹⁴⁸ *India - Quantitative Restrictions AB Report*, *supra* note 78, ¶ 94. This interpretative principle is the expression of the prevalence of text over context in the interpretation of WTO law, perhaps one of the most important interpretative choices the AB made to assess the content of the covered agreements. Indeed, in the words of one of its former members, “[a]mong these three criteria [provided in Article 31 of the Vienna Convention: namely, text, context, and object and purpose], the Appellate Body has attached the greatest weight to the first, i.e., ‘the ordinary meaning of the terms of the treaty.’” Ehlermann, *supra* note 78, at 615.

¹⁴⁹ *Bovine Hides Report*, *supra* note 3, ¶ 11.95 n.378.

¹⁵⁰ *Id.* ¶¶ 11.76, 11.77.

manner so as to permit persons with adverse commercial interests to obtain confidential information to which they have no right.”¹⁵¹ The mere presence in export procedures of a party who has conflicting interests from exporters clearly poses the danger pointed out by the Panel, although one cannot state that the danger is in itself inherent. However, another dimension of the problem exists if the Panel believes that the industry allowed to participate in the export procedures is cartelized and is fixing domestic prices of the very same product about to be exported. In the author’s opinion, that is why the Panel spoke of an inherent danger. Put differently, the fact that the Panel intuited the existence of a cartel probably led to the determination that the cartel’s mere presence in the export process of bovine hides was dangerous for the impartial application of Argentinean customs, laws, and regulations regarding the treatment of slaughterers’ confidential information.

The Panel used the *Act* method when it adopted a tough stance regarding the claim of a violation of Article X(3)(a) in order to provide a WTO solution for what the Panel thought was a likely horizontal cartel in the tanning industry.¹⁵² As will be shown below, the Panel employed hypocritical treatment regarding, first, the possible influence of ADICMA’s representatives on Argentina’s customs authorities to block or delay exports of bovine hides, and second, the possible influence of ADICMA representatives, this time by providing tanners with slaughterers’ confidential information. Argentinean law considered both actions unlawful. Such unlawfulness was considered relevant by the Panel when evaluating the first situation and completely irrelevant when dealing with the second one, thereby allowing the Panel to consider the inherent risk of partiality in the application of the Resolution.

The Panel considered that, given that under Argentinean law it was unlawful for customs officials to give in to pressure by ADICMA representatives to block or delay exports of bovine hides, it could not presume that such a likely influence determine the existence of an export restriction. It held the following:

It must be stated, in addition, that if an attempt on the part of ADICMA to put pressure on the Customs officials in charge of a particular inspection were successful, those officials would act unlawfully under Argentinean law. However, absent evidence to the contrary, it cannot simply be presumed that Customs officials bow to possible pressure from ADICMA.¹⁵³

Argentina argued that the possible influencing of Argentinean customs

¹⁵¹ *Bovine Hides Report*, *supra* note 3, ¶ 11.100.

¹⁵² *See supra*, Part VI.C.2.(a).

¹⁵³ *Bovine Hides Report*, *supra* note 3, ¶ 11.31.

officials by tanners to have the customs officials provide the tanners with slaughterers' confidential information was also unlawful. The Panel considered this in its report:

Argentina asserts that disclosure of confidential information, which the European Communities alleges, constitutes offences covered by Argentine criminal law, Chapter 3 "Violation of Secrecy" and Chapter 9 *bis* "Illicit enrichment of civil servants or employees."¹⁵⁴

Logically, one could have expected a similar approach from the Panel, because in both situations it was illegal for customs officials to give in to the tanners' pressure. Hence, since it was unlawful under Argentinean law for customs officials to bow to tanners' pressure and offer slaughterers' confidential information,¹⁵⁵ the Panel could not presume any partial application of Argentina's custom regulations to grant tanners such access. However, in examining this claim, the Panel presumed the partial application of Argentina's customs regulations to allow tanners to have access to such information by calling it an "inherent danger."¹⁵⁶ The unlawfulness of this conduct under Argentinean law was irrelevant to the Panel.

The Panel concluded that there was an "inherent danger" after it found that Argentina had provided information that the Panel considered private to ADICMA representatives.¹⁵⁷ When the information was provided to the ADICMA representatives, Argentina considered the information public,¹⁵⁸ and the Panel had yet to speak on the issue. Yet, because it subsequently determined the information to be private, the Panel tacitly concluded that this in itself constituted an inherent danger of partiality.¹⁵⁹ This is, however, an incorrect assumption. There are two potential situations: (i) customs officials grant ADICMA representatives access to information that Argentina considers in *the public domain at the time of its revelation*, but that *later* the Panel deems confidential; and (ii) customs officials grant ADICMA representatives access to information that Argentina's law labels

¹⁵⁴ *Id.* ¶ 4.76.

¹⁵⁵ *See id.*, Code Criminal, Ch.3, 9 (Arg.).

¹⁵⁶ *See Bovine Hides Report*, *supra* note 3, ¶ 4.74.

¹⁵⁷ *See supra* text accompanying note 126. Information the Panel considered private included slaughterers' pricing information, name of slaughterers' exporters, and quantities and destinations of exports.

¹⁵⁸ There was in this case a debate regarding what information ADICMA representatives had access to and whether or not it was confidential. Argentina alleged that certain information was already in the public domain through some data bases. *See Bovine Hides Report*, *supra* note 3, ¶ 4.74. The Panel found that certain information that Argentina considered public, such as pricing information and name of exporters, was confidential. *See id.* ¶¶ 11.92, 11.93.

¹⁵⁹ *See supra* text accompanying notes.

confidential at the time of disclosure. The first situation does not presume the second for one simple reason. Under (i), customs official assume they are acting lawfully, but under (ii), they know they are acting unlawfully.

The *Bovine Hides* Panel did not make this distinction for the same reason that it did not take into account Argentina's unlawfulness of revealing confidential information: the distinction it allowed the Panel to declare the existence of the inherent danger as a matter of law and not as a matter of fact. Thus, the Panel did not have to demonstrate that there was evidence of Argentina's customs officials providing confidential information under Argentinean law at the time of the revelation to ADICMA representatives. Even though the Panel lacked evidence of customs officials providing confidential information, it declared that such an inherent risk existed.

The previous analysis applies to how the Panel reached the conclusion that the Resolution did not meet the requirement of reasonableness in the application of Argentina's customs laws and regulations. Certainly, this is because the Panel declared that the Resolution was unreasonable given that it "inherently contains the possibility of revealing confidential information."¹⁶⁰ This argument is similar to claiming that the Resolution contains an "inherent danger that customs laws and regulations will be applied in a partial manner so as to permit persons with adverse commercial interests to obtain confidential information to which they have no right,"¹⁶¹ which was the basis for declaring that the Resolution was partial.

Thus, the *Bovine Hides* Panel exhibited traces of the spirit of the *Act* decisions. This occurred first when the *Bovine Hides* Panel deployed interpretive techniques to expand the reference to traders in Article X.1 to cover Article X:3(a). This led to the conclusion that the competitive situations of private traders cannot be affected by the unreasonable, partial, or lack of uniform application of customs rules and regulations.¹⁶² Second, the Panel declared that there was an inherent risk of partial application of the Resolution despite the absence of any proof of Argentina's customs officials submitting to representatives of ADICMA confidential information.¹⁶³

The *Bovine Hides* Panel was reluctant to use WTO law directly against private cartels, and it was not eager to tolerate the possible negative influence on the impartial and reasonable application of Argentinean customs laws of a cartel whose existence the Panel deemed likely. In this author's view, the Panel sought to limit its impact by reducing the role played by such a cartel within the export process of bovine hides. Because

¹⁶⁰ *Id.* ¶ 11.94.

¹⁶¹ *Id.* ¶ 11.101.

¹⁶² See *supra* text accompanying note 138.

¹⁶³ See *supra* text accompanying note 127.

of its conclusion that the possibility of ADICMA having broad access to slaughterers' confidential information was an unreasonable and partial application of Argentinean customs laws and regulations, the implementation process of the *Bovine Hides* report meant a significant reduction of such access.¹⁶⁴

Thus, the result of this case, and how it was decided both reveal a mixture of the *Film* and the *Act* approaches. From the European Communities' perspective, there is unquestionable continuity between the *Act* and the *Bovine Hide* reports. In both cases, the European Community addresses antitrust issues and creates a WTO remedy.

Nevertheless, such continuity incorporates important differences for

¹⁶⁴ *Bovine Hides Report*, *supra* note 3. As part of the implementation process of the *Bovine Hides* report, Argentina and the European Community agreed considering confidential a broad set of data, to which ADICMA representatives will no longer have access:

General information: Registration number of the export destination (EC), Number/business name and Tax Identification Number (CUIT) of: (a) the exporter; (b) the customs agent; (c) the customs transport agent; (d) the carrier; (e) the bank involved; Means of transport; Transport document; Identifier of the way bill; Name of transport company/registration/owner; Flag; Port of shipment; Mark and number of packages; Packaging; Total number of packages; Gross weight; Date of shipment/time-limit; Purpose/authorization number; Customs office of exit; Conditions of sale; Total f.o.b. value/currency; Total freight/currency; Total insurance/currency; Guarantees; Additional information; and Date of closure of sale.

Information concerning the goods: Total net weight in kilograms; Province of origin; Country of destination; Statistical unit/number of statistical units; Additional information; and Options/advantages.

Market value: Unit value in foreign exchange/unit/number of units; Total f.o.b. in foreign exchange/dollars; Official unit price/coefficient/number of units; Documents to be submitted.

Customs value: Adjustment/deduction to be made in foreign exchange; Customs value in foreign exchange/dollars; Temporarily imported inputs in dollars; Inputs imported for consumption in dollars; Value of refunds

Liquidation: Amounts to be paid/collected/guaranteed and Date of closure of sale.

See Argentina - Measures Affecting the Export of Bovine Hides and the Import of Finished Leather, WT/DS155/12, (Feb. 26 2002) at 5. ADICMA'S participation in the export process of bovine hides was considerably diminished because of the *Bovine Hides* report. The report also severely curtailed ADICMA's access to large amounts of slaughterers' information.

the development of WTO competition jurisprudence. The *Act* rulings extended the scope of WTO rules on a domestic antitrust issue.¹⁶⁵ This is different from the result in the *Bovine Hides* report, where the Panel provided a WTO remedy to attenuate the consequences on international trade of a likely cartel without attempting to suppress it, if the cartel existed, and without the intention to expand the WTO framework. Undeniably, this result was a safe remedy for a competition problem because it did not have to use an antitrust analysis and apply WTO law. In conclusion, an adequate depiction of the three existing WTO competition decisions shows that the *Act* approach is clearly activist, the *Film* approach is marked by self-restraint, and the *Bovine Hides* case exemplifies the tension between those two approaches.

Nonetheless, it is important to examine the theoretical possibilities for future development of WTO competition jurisprudence. To depict such possibilities, the author will present here some generalizations that depart from the particularities of the existing competition decisions and of the claims in the *Telecommunications* dispute.¹⁶⁶ Unquestionably, these cases have opened the door for the potential development of a richer WTO competition jurisprudence, based on direct violation cases, a door that was supposed to be closed following the *Film Report*.

VII. THE POTENTIAL RICHNESS OF WTO COMPETITION JURISPRUDENCE

After the ratification of the *Film* approach by the AB in its *Asbestos* report,¹⁶⁷ the development of competition jurisprudence will be expected not in non-violation nullification and impairment cases, but in violations disputes, such as the *Act* and the *Bovine Hides* cases, brought before the DSB through the mechanism of Article XXIII.1(a) of the GATT.¹⁶⁸ This

¹⁶⁵ See *supra* Part III.

¹⁶⁶ See *infra* Part VIII. A general view of the *Telecommunications* case will be discussed in the final part of this paper.

¹⁶⁷ See *supra* text accompanying note 90.

¹⁶⁸ GATT/1994, *supra* note 14, at art XXIII.1(a). This article provides, in relevant part:

1. If Any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of . . .

(a) the failure of another contracting party to carry out its obligations under this Agreement. . . the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

means complaining Member States must demonstrate that the given competition situation violates specific WTO provisions, and Panels and the AB will have to interpret the invoked precepts and ratify or reject the alleged violation. Thus, two types of WTO precepts, WTO competition provisions and WTO non-competition provisions, may be the subject of violation cases and decisions.¹⁶⁹

As will be seen, the WTO has some provisions addressing competition matters that could be violated directly by Member States, thereby originating a case before the DSB on the basis of Article XXIII.1.(a). These provisions are not uniform regarding the level of obligations imposed on Member States, so a categorization of such competition norms is useful in order to establish which type makes possible the development of the WTO competition jurisprudence.

A. Types of WTO Competition Provisions

WTO competition provisions can be divided into three categories: (i) pro-competition provisions, (ii) mandatory anti-restrictive business practices precepts, and (iii) exhortatory anti-restrictive business practices norms.

1. *WTO Pro-competition Provisions*

Usually, WTO precepts deal exclusively with Members' actions or omissions, without regard for what private companies do. However, WTO pro-competition provisions constitute the exception to this rule, because by virtue of these decisions, Member States acquire the duty to ensure that their private undertakings or non-governmental bodies behave in the way set forth by the given WTO pro-competition provision. If they do not perform so, and the given Member state does nothing to ensure the existence of the respective private or non-governmental pro-competitive behavior, the Member violates the respective norm, and a case before the DSB may arise.

Perhaps the most striking examples of a WTO pro-competition

2. If not satisfactory adjustment is effected between the contracting parties concerned within a reasonable period of time, . . . the matter may be referred to the contracting parties. The contracting parties shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. . . .

¹⁶⁹ This categorization and all others that will appear below in Part VII.A., along with their respective definitions, do not exist in WTO law and are made here to facilitate the presentation of the hypothetical possibilities for development of WTO competition jurisprudence.

provision are the *Annex on Telecommunications*¹⁷⁰ and the Reference Paper.¹⁷¹ Negotiated within the privatization process of the telecom industry,¹⁷² both require Member States to ensure interconnection with other Members' service suppliers no matter whether the telecommunication transport networks are privately or publicly owned. Specifically, in the case of private ownership of such a network, the *Annex* and the Reference Paper impose on Members the duty to be certain that the private owners will ensure interconnection of their networks with other Members' suppliers "on reasonable and non-discriminatory terms and conditions"¹⁷³ for the supply of a service included in the Members' Schedules.¹⁷⁴ The interconnection duty must grant foreign suppliers the following three rights:

[1] To purchase or lease and attach terminal and other equipment which interfaces with the network and which is necessary to supply a supplier's services.¹⁷⁵

[2] To interconnect private leased or owned circuits with public telecommunications transport networks and services or with circuits leased or owned by another service supplier.¹⁷⁶

[3] To use public telecommunications transport networks and services for the movement of information within and across borders, including

¹⁷⁰ *Annex on Telecommunications*, Annex 1B, General Agreement on Trade in Services. WTO Legal Texts, *supra* note 33, at 314.

¹⁷¹ World Trade Organization Fourth Protocol to the General Agreement on Trade in Services. S/L/20. Apr. 30, 1996 [hereinafter Reference Paper]. Strictly speaking, the Reference Paper is not part of the *Annex on Telecommunications*; however, it is binding through the mechanism of additional commitments provided for in Article XVIII of the GATS for those Members that so decided. Fifty-three countries included the Reference Paper within their Schedules. This was the way the negotiators avoided the tortuous path of amendment of the GATS. See Laura B. Sherman, "Wildly Enthusiastic" About the First Multilateral Agreement on Trade in Telecommunications Services, 51 FED. COMM. L. J. 1, 88 (1998).

¹⁷² In 1997, private companies controlled the telecommunication networks of 57 WTO Members.

¹⁷³ *Annex on Telecommunications*, *supra* note 171, at art. 5(a).

¹⁷⁴ Reference Paper, *supra* note 171, § 2.5. The need to ensure interconnection when private companies own public telecommunication networks was the basis for Section 2.5 of the Reference Paper, according to which an independent body will evaluate claims regarding the lack of fulfilment of the interconnection obligations set forth in the *Annex on Telecommunications* and the Reference Paper, when the latter makes part of the Schedule of a given Member. Indeed, although Article VI(2)(a) of the GATS already provided judicial review of administrative actions, such revision was not contemplated when the source of the complaint was private behaviour; thus, the above-mentioned Section filled this gap.

¹⁷⁵ *Annex on Telecommunications*, *supra* note 171, at art. 5(b)(i).

¹⁷⁶ *Id.* at art. 5(b)(ii).

for intra-corporate communications . . . and for access to information contained in data bases or otherwise stored in machine-readable form in the territory of any Member.¹⁷⁷

The interconnection duty provided for in the *Annex on Telecommunications* rests on a major supplier, public or private, who according to the Reference Paper:

[h]as the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of (a) control over essential facilities; or (b) use of its position in the market.¹⁷⁸

Such major suppliers must ensure interconnection of their networks with other Members' telecommunications providers according to the following criteria: non-discriminatory terms and conditions,¹⁷⁹ interconnection within a timely fashion,¹⁸⁰ and cost-oriented and sufficiently unbundled rates.¹⁸¹ It is important to note that Members have the WTO duty to ensure that their private major suppliers provide interconnection with foreign suppliers according to the parameters set by the *Annex* and the Reference Paper. The absence of the exact type of interconnection envisioned by the WTO constitutes a violation of the respective Member's WTO obligations under the *Annex* and the Reference Paper.

2. Mandatory Anti-restrictive Business Provisions

By virtue of mandatory anti-restrictive business provisions, Member States have the obligation of preventing the existence of the restrictive business practice set forth by the respective WTO norm. Member States violate this obligation when they are aware of the existence of the restrictive practice but do not eradicate it. To use the expression used in the *Bovine Hides* report, this sort of WTO provision imposes on Member States a due diligence duty to prevent the existence of the given restrictive practice.¹⁸²

The first example of this type of WTO competition norm is Article VIII(2) of the *General Agreement on Trade in Services* (GATS). This precept stipulates that:

[w]here a Members' monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the

¹⁷⁷ *Id.* at art. 5(c).

¹⁷⁸ Reference Paper, *supra* note 171.

¹⁷⁹ *See id.* § 2.2(a).

¹⁸⁰ *See id.* § 2.2(b).

¹⁸¹ *See id.*

¹⁸² *See Bovine Hide Report, supra* note 4, ¶ 11.52.

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.¹⁸³

It is important to highlight that the due diligence duty imposed by Article VIII(2) involves public or private monopoly suppliers, by virtue of the definition of this term in Article XXVIII(h) of the GATS:

For the purpose of this Agreement:

...

(h) "monopoly supplier of a service" means any person, public or private, which in the relevant market of a territory of a Member is authorized or established formally or in effect by that Member as the sole supplier of that service.¹⁸⁴

A second example of WTO mandatory anti-restrictive business provisions is Article 1.1 of the Reference Paper. The Reference Paper sets forth the "definitions and principles on the regulatory framework for the basic telecommunications services," and in the above-mentioned provision establishes the following:

Prevention of anti-competitive practices in telecommunications:

Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.¹⁸⁵

There is, then, a clear duty of due diligence on the part of Members to prevent major suppliers of basic telecommunications services, either public or private, from practicing anti-competitive behavior.

3. Exhortatory Anti-restrictive Business Provisions

Not all WTO competition provisions set forth obligations on Members concerning the given competition issue. There are other exhortatory character provisions that provide only for a duty to evaluate other Members' complaints about certain anti-competitive practices, thus excluding the obligation to either prevent or eliminate the respective

¹⁸³ Marrakesh Agreement Establishing the World Trade Organization. General Agreement on Trade in Services, Annex 1B; WTO Legal Texts, *supra* note 33, at 293.

¹⁸⁴ *Id.* at 306.

¹⁸⁵ Reference Paper, *supra* note 171.

practice. Indeed, Article 40 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPS") exemplifies this third category of WTO competition precepts.¹⁸⁶

After Member States recognized in Article 40(1) that certain licensing practices and conditions linked to intellectual property rights hampering competition might affect trade, Article 40(3) required Member state's respective intellectual property owner to evaluate any claim of the other Member state regarding such an owner's practices, without the WTO obligation of suppressing them. These norms stipulate:

Control of Anti-Competitive Practices in Contractual Licenses

Members agree that some licenses practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and impede the transfer or dissemination of technology. . . .

3. Each Member shall enter, upon request, into consultations with any other Member which has cause to believe that an intellectual property right owner that is a national or a domiciliary of the Member to which the request for consultation has been addressed is undertaking practices in violation of the requesting Member's laws and regulations on the subject matter of this Section, and which wishes to secure compliance with such legislation, without prejudice to any action under the law and to the full freedom of an ultimate decision of either Member. The Member addressed shall afford full and sympathetic consideration to, and shall afford adequate opportunity for, consultations with the requesting Member, and shall co-operate through supply of publicly available non-confidential information available to the Member, subject to domestic law and to the conclusion of mutually satisfactory agreements concerning the safeguarding of its confidentiality by the requesting Member.¹⁸⁷

Thus, there are WTO competition provisions that are exclusively exhortatory in their condemnation of the existence of certain private anti-competitive behavior.

¹⁸⁶ Marrakesh Agreement Establishing the World Trade Organization, Annex 1C. Agreement on Trade-Related Aspects of Intellectual Property Rights. WTO Legal Texts, *supra* note 33, at 321.

¹⁸⁷ WTO Legal Texts, *supra* note 33, at 338-39.

B. Development of WTO Competition Jurisprudence through Violation Cases of WTO Competition Provisions

On appeal, Panels and the AB will find a more favorable environment to provide a WTO solution to the given competition problem when they have violation cases based on either WTO pro-competition and WTO mandatory anti-restrictive practice provisions.¹⁸⁸ The very existence of this type of provision, on which respective decisions can be based, removes many of the political hurdles that a Panel and the AB face when deciding a competition case.¹⁸⁹ Under these circumstances, complaining Member States, the given Panel, and the AB do not bear the heavy burden of proof required to demonstrate that the WTO covers the particular competition issue. WTO competition jurisprudence based on pro-competition and mandatory anti-restrictive practices provisions usually should not trigger concerns regarding an imbalance of power within the whole structure of the DSB. To use Trachtman's words, Panels and the AB have by virtue of these provisions, "textual authorization"¹⁹⁰ to embark on the development of WTO competition jurisprudence.

Some would argue that what I call pro-competition provisions are not antitrust matters, because they deal with market access and not with anti-competitive behavior. Thus, any jurisprudence regarding them cannot be labeled competition jurisprudence. However, WTO anti-restrictive practices and pro-competition provisions share certain features that make it possible to group them together under a broader category: WTO competition precepts. First, WTO law usually aims at regulating Members' behavior *exclusively*,¹⁹¹ because only States are parties to the WTO. What their private companies undertake within their territories is not a matter of concern for WTO law. This is not the case for WTO pro-competition and anti-restrictive practices provisions, wherein Members have the obligation to promise that their private companies will behave in the way stipulated by the given provision. There is a specific mandate on Members regarding private behavior taking place within their territory. This is the opposite of

¹⁸⁸ Vienna Convention on the Law of Treaties, May, 1969, art. 31, *available at* <http://www.un.org/law/ilc/texts/treatfra.htm>. It is clear that exhortatory anti-restrictive practices provisions cannot constitute the basis of a violation case, and the judicial framework of the DSB will not have in principle the opportunity to render a decision based on them. However, the role of exhortatory competition provisions is to interpret others, when possible, by virtue of Article 31 of the Vienna Convention.

¹⁸⁹ Violation cases of pro-competition and mandatory anti-restrictive practices provisions may find a more favorable environment for a WTO solution, but this does not mean that they will always get one. All depends on the particularities of the specific case, the strength of its facts, and the legal arguments used, among many other factors.

¹⁹⁰ See Trachtman, *supra* note 29 and accompanying text.

¹⁹¹ See WTO Agreement, *supra* note 33, at art. XII; WTO Legal Texts, *supra* note 33, at 12.

the structure in the majority of WTO norms, where only State behavior is determinant of compliance.¹⁹² Therefore, these precepts are the only two exceptions to the general type of WTO norms.

Second, both classes of provisions seek to enhance competition regarding specific types of private companies. Pro-competition provisions order Members to make sure that a given pro-competitive private behavior exists, while anti-restrictive practice precepts compel Members to prevent their private companies from undertaking anti-competitive actions in certain domains. Thus, these two similarities justify the inclusion of the above-mentioned type of WTO norms under the wider category of WTO competition provisions.¹⁹³

1. *Legislation Violating WTO Competition Provisions*

The analysis thus far has shown that the first branch of WTO competition jurisprudence consists of violation cases of WTO competition provisions. However, this analysis can be taken one step further. There are two situations that could lead to violation of WTO competition provisions: (1) municipal legislation inconsistent with WTO competition provisions and, (2) factual practices contrary to WTO competition precepts.

(a) Legislation Violating WTO Pro-competition Provisions

Legislation violating pro-competitive WTO provisions occurs when a legislation enacted by a Member state prevents the existence of the pro-competitive behavior stipulated in the WTO norm. The United States claims that this type of violation exists in the *Telecommunications* case:

Mexican basic telecom service suppliers will not make private leased circuits available to their foreign counterparts to provide cross-border facilities-based services into Mexico. Indeed, the ILD ["International Long Distant Rules"], together with other Mexican law and regulations, prevent Mexican firms from doing so.¹⁹⁴

The evaluation of any claim that legislation violates a WTO law in this

¹⁹² See GATT 1994, *supra* note 14, at art. XXIII.

¹⁹³ I am well aware of the fact that WTO law has a bearing on competition. This is because, as the U.S. International Competition Policy Committee pointed out, "the basic nondiscrimination principles of national treatment, most-favored-nation treatment, and transparency that compose the foundation of the WTO support the operation of impartial competition policy regimes." U.S. International Competition Policy Committee, *supra* note 29. Obviously, this does not mean that all trade jurisprudence will become competition jurisprudence this way, because what distinguishes these principles from the here-labeled competition provisions is the fact that it is private behavior that determines whether Members are complying with these provisions.

¹⁹⁴ *Telecommunications Case*, *supra* note 4, at 3.

manner involves analysis that goes beyond the text of the specific legislation at issue. The *Section 301* report established that in claims of this type, “internal elements legally relevant to the construction of the legislation should be determinative”¹⁹⁵ and that the elements of national laws are often inseparable and “should not be read independently from each other when evaluating the overall conformity of the law with WTO obligations.”¹⁹⁶ Additionally, the *Act* Panel report specified that among such internal elements are the domestic application of that law, its historical context and legislative history, and subsequent declarations of the Members’ authorities.¹⁹⁷ Finally, it is also important to keep in mind that this entire process is relevant only when WTO law permits the existence of administrative discretion, because there may be situations, as the *Section 301* report established, where even such discretion is prohibited by the relevant WTO agreement.¹⁹⁸ Thus, all the elements must be taken into account in order to demonstrate that legislation violates a WTO pro-competition provision.

(b) Legislation Violating WTO Mandatory Anti-restrictive Business Provisions

WTO competition jurisprudence develops when domestic legislation precludes a Member state from preventing the adoption or maintenance of a given anti-competitive behavior by its public or private enterprises. This violation may happen in two circumstances: (i) the accused legislation mandates private or public enterprises to adopt the practice that the WTO provision condemns;¹⁹⁹ or (ii) such legislation²⁰⁰ expressly authorizes public or private undertakings to adopt or maintain such a conduct. In both situations, the respective Member state cannot fulfill its WTO obligation of

¹⁹⁵ *Section 301 Report*, *supra* note 86, ¶ 7.114.

¹⁹⁶ *Id.* ¶ 7.27.

¹⁹⁷ *See Act Panel Report*, *supra* note 3, ¶ 6.48.

¹⁹⁸ *See Section 301 Report*, *supra* note 86, ¶¶ 7.53, 7.54; *see Act AB Report*, *supra* note 3, ¶ 99 n.59. The AB tacitly endorsed this type of situation in its *Act Report*. For a complete analysis of this whole issue, see Sharif Bhuiyan, *Mandatory and Discretionary Legislation under the WTO*, 5 J. OF INT’L ECON. L. 571 (2002).

¹⁹⁹ *Telecommunications Case*, *supra* note 4, at 3; *see infra* texts accompanying notes 221-22. That would be the case, for instance, if a Member enacts legislation mandating its major suppliers of basic telecommunication services to engage in certain anti-competitive behavior aimed at preventing other Members’ suppliers from providing these services in the former’s market. This legislation would be inconsistent with Article 1.1 of the Reference Paper, which orders Members to respond appropriately to impede major suppliers from engaging in behavior of this sort. This is one of the United States’ claims in the *Telecommunications case*.

²⁰⁰ This legislation is unlikely in reference to post-WTO domestic legislation, but hypothetically possible regarding pre-WTO national legislation.

preventing the existence of the given restrictive practice, and a dispute before the DSB may arise.

There is a third possibility: absence of legislation condemning the behavior expressly contemplated by the WTO mandatory anti-restrictive practice provision. It is possible that domestic legislation does not condemn the restrictive practice, making it necessary to enact a new domestic law. The absence of such new legislation also precludes Member States from preventing the existence of the given restrictive practice, because if the practice is adopted or maintained, Members do not have laws to eliminate it. Clearly, this omission will violate not only the correspondent WTO mandatory anti-restrictive practice provision but also Article XVI.4 of the WTO Agreement ordering all Members to "ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements."²⁰¹ Hence, given the existence of WTO competition provisions imposing obligations on Member States to eradicate certain restrictive behavior, there is always a possibility that national legislation, or its utter absence, may violate such competition provisions, thereby becoming an issue for the DSB to solve.

2. Particular Behavior Violating WTO Competition Provisions

(a) Particular Behavior Violating WTO Pro-Competition Provisions

Cases where particular behavior opposes WTO competition provisions arise when a Member state does not allow the specific pro-competitive private behavior that the foregoing provisions order Members to ensure. This occurs in the *Telecommunications* dispute. There, the United States maintained that "Mexico's measures fail to ensure that Telmex provides interconnection to U.S. cross-border basic telecom suppliers on reasonable rates, terms and conditions"²⁰²

The burden of proof on complaining Members under this circumstance differs from the traditional requirements of WTO jurisprudence. Traditionally, GATT and WTO jurisprudence have mandated that in order to declare a Member liable for the behavior of its private undertakings, the other side must prove that the existence or maintenance of the respective private behavior is the direct result of the Member's actions.²⁰³ For

²⁰¹ WTO Legal Texts, *supra* note 33, at 14.

²⁰² *Telecommunications Case*, *supra* note 4, at 2.

²⁰³ See *Japan - Trade in Semi-Conductor*, BISD II/188, May 4, 1998, ¶ 102 [hereinafter *Semi-Conductor Panel Report*]. Among the private practices that have been declared "governmental" is the export control put in place by private Japanese producers of semi-conductors in order to export their products at prices not below company-specific costs. The Panel on *Japan - Trade in Semiconductors* found that this export decision was not the private

example, the Panel report *Japan - Trade in Semiconductors* affirmed that:

First, there were reasonable grounds to believe that sufficient incentives or disincentives existed for non-mandatory measures to take effect. Second, the operation of the measures to restrict export of semi-conductors at prices below company-specific costs was essentially dependent on Government action or intervention. The Panel considered each of these two criteria in turn. The Panel considered that if these two criteria were met, the measures would be operating in a manner equivalent to mandatory requirements such that the difference between the measures and mandatory requirements was only of form and not of substance.²⁰⁴

This jurisprudence was ratified by the Panel in the *Film Report*, which pointed out the following:

[P]ast GATT cases demonstrate that the fact that an action is taken by private parties does not rule out the possibility that it may be deemed governmental if there is sufficient governmental involvement with it. It is difficult to establish bright-line rules in this regard, however. Thus, that possibility will need to be examined on a case-by-case basis.²⁰⁵

However, particular behavior violating pro-competition provisions are the first exception to this rule. In fact, there is a due diligence duty imposed on Member States to ensure the performance of the given specific actions by private undertakings. Thus, even if there is no direct governmental involvement, there is a breach of the provision when private companies do not adopt the pro-competitive behavior set forth by the WTO norm, and their Member States do nothing to ensure the companies' performance.

In consequence, to demonstrate a *prima facie* violation of a pro-competition provision, the complaining Member must prove, first, that there is behavior by a private undertaking in the defendant Member state's territory and, second, that such private behavior does not correspond to the one the given WTO pro-competition provision orders Members to adopt.²⁰⁶ Proof of the defendant Member's direct involvement is not required. Once this burden of proof is met, the defendant Member must refute the existence of the violation by demonstrating that the private behavior accords with what the provision prescribes.

This does not mean that defendant Members' direct involvement will

exporters' autonomous determination but the result of the Government of Japan's administrative structure designed to exert pressure on such producers in order to ensure that exports were not made at prices below the foregoing cost.

²⁰⁴ *Id.* ¶ 109.

²⁰⁵ *Film Report*, *supra* note 2, ¶ 10.56.

²⁰⁶ *See Telecommunications Case*, *supra* note 4, at 2.

never be present in this type of competition case. In fact, if the private behavior provided for in the respective WTO pro-competition provision is not in place because the defendant Member is encouraging or mandating its private companies not to adopt the given behavior, the complaining party can provide the proof of that, as the United States has tried to do in the *Telecommunications* case. The United States alleges in that case that Mexican measures permit Telmex not to adhere to the private behavior ordered by the GATS and Mexico's schedule of commitments.²⁰⁷

(b) Particular Behavior Violating WTO Mandatory Anti-restrictive Practices Provisions

WTO mandatory anti-restrictive practices provisions impose a due diligence duty on Member States to prevent the existence of the given practice, making the presence itself of the restrictive behavior the violation of the given WTO provision. One example of this type of competition case is already before the DSB. In the *Telecommunications* case, the United States maintains that:

Section 1.1 of the Reference Paper requires Mexico to maintain appropriate measures to prevent Telmex from engaging in or continuing anti-competitive practices. The United States considers that Mexico has not fulfilled this commitment.²⁰⁸

The burden of proof in this type of case is similar to that in cases of particular behavior contrary to WTO pro-competition provisions. Indeed, Member States do not need to be directly involved to violate the mandatory anti-restrictive practice provisions; the lack of fulfillment of the due diligence duty to prevent the existence of the given restrictive practice means a breach of the respective WTO provision. However, Members may furnish proof of why the restrictive practice is in place.²⁰⁹

It is important to highlight that although the proof of the defendant Member States' involvement is not required does not mean that the burden of proof is easy to fulfill. Complaining Members have to demonstrate, first, that there is a private restrictive practice in place and, second, that it corresponds with the one provided for by the WTO mandatory anti-restrictive practice provision.

In summary, the first source of cases leading to the development of WTO competition jurisprudence may stem from direct violation of WTO

²⁰⁷ See *id.*

²⁰⁸ *Id.* at 5.

²⁰⁹ See *id.* This is similar to what the United States has tried to do in the *Telecommunications* case by claiming that the anti-competitive behavior at issue is in place by virtue of Mexican legislation.

competition provisions, specifically; pro-competition and mandatory anti-restrictive practices norms. Any of these precepts can be violated by legislation or by particular situations. There is, however, a second source of cases able to generate WTO competition jurisprudence: disputes involving direct violation of WTO non-competition provisions.

C. Competition Cases of Violation of WTO Non-competition Provisions

The *Act* and the *Bovine Hides* decisions demonstrate that using WTO competition provisions is not the best way to resolve out antitrust issues since creative interpretations of precepts that in principle have no bearing on such issues may also achieve the same result.

1. Antitrust Legislation Violating as Such WTO Non-competition Norms

As the *Act* decisions show, antitrust legislation may be opposed to WTO non-competition provisions. However, determining what new competition issues will be covered by non-competition provisions, thus preventing antitrust legislation from regulating them, is uncertain, because it is a matter only for the judicial framework of the DSB to decide based on Members' competition disputes. Regardless, the ongoing expansion of the WTO framework, along with the possibility of new interpretations of existing WTO norms, might increase the chances of allowing WTO non-competition provisions to cover areas traditionally occupied by domestic antitrust legislation. It would be unwise to disregard this area of potential development for WTO competition jurisprudence started with the *Act* rulings.

However, among the key aspects that Panels and the AB must assess before declaring a piece of antitrust legislation violates a WTO non-competition provision, is the possibility of implementation of the rulings and recommendations adopted by the DSB.²¹⁰ The *Act* case has revealed, by the United States' reluctance to implement the recommendations of the DSB in this dispute, how the evolution of WTO competition jurisprudence may face problems in the implementation phase.

More than two years after their adoption, the United States has yet to implement the recommendations of the DSB. First, an arbitrator appointed pursuant to Article 21.3(c) of the DSB²¹¹ determined that the reasonable

²¹⁰ See Garret & McCall, *supra* note 82. As Garret and McCall argue, the AB is aware of the fact that the implementation of its reports is one of the key aspects of the building of the reputation of the judicial framework of the WTO, and sometimes adjusts its decisions to facilitate compliance with them.

²¹¹ The rule mandates:

At a DSB meeting held within 30 days after the date of adoption of the Panel or AB report, the Member concerned shall inform the DSB of its intentions in respect of implementation of

period for implementation of the *Act* rulings was ten months from the date of adoption of the *Act* decisions.²¹² This date (September 26, 2001) passed without the U.S. Congress enacting legislation repealing the *Anti-Dumping Act of 1916*.²¹³ On February 19, 2002, pursuant to Article 22.6 of the DSB, at the request of the European Communities, three arbitrators were appointed to decide the level of suspension of concessions that the European Communities and Japan may impose on the United States.²¹⁴ Although the arbitration proceeding was suspended due to an agreement between the parties when the U.S. administration introduced a bill in both the Senate and the House of Representatives repealing the *Act*, on September 20, 2003. These proceeding resumed at the request of the European Communities, given the absence of new developments regarding the repeal.²¹⁵ On February 24, 2004, the arbitrators issued their report authorizing the European Communities to suspend obligations under GATT 1994 and the Anti-Dumping Agreement against imports from the United States.²¹⁶

Certainly, political circumstances made it difficult for the United States to bring the *Anti-Dumping Act of 1916* into conformity with Article VI of the GATT and the *Anti-Dumping Agreement*.²¹⁷ However, these

the recommendations and rulings of the DSB. If it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so. The reasonable period of time shall be: . . .

(c) a period of time determined through binding arbitration within 90 days after the date of adoption of the recommendation and rulings. In such arbitration, a guideline for the arbitrator should be that the reasonable period of time to implement Panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of the Panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances [internal citations omitted].

World Trade Organization, Dispute Settlement Body, art. 21.3(c).

²¹² World Trade Organization, *United States – Anti-Dumping Act of 1916*. Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, WT/DS136/11, WT/DS162/14, Feb. 28, 2001 at 17. [hereinafter *Act Article 21.3 Arbitration*], available at <http://www.worldlii.org/int/cases/WTOARB/2001/2.html>.

²¹³ World Trade Organization, *United States – Anti-Dumping Act of 1916*. Recourse by the European Communities to Article 22.2 of the DSU. WT/DS136/15, Jan. 11, 2002 at 1.

²¹⁴ *Id.*; Note by the Secretariat. WT/DS136/17, Feb. 19, 2002.

²¹⁵ *United States – Anti-Dumping Act of 1916*, Recourse by the United States to Article 22.6 of the DSU *Communication from the Arbitrators*, WT/DS136/19 Sep. 29, 2003.

²¹⁶ World Trade Organization, *United States – Anti-Dumping Act of 1916*. (Original Complaint by the European Communities). Recourse to Arbitration by the United States under Article 22.6 of the DSU. Decision by the Arbitrators. WT/DS136/ARB, ¶¶ 8.1, 8.2.

²¹⁷ See *Act Article 21.3 Arbitration*, *supra* note 198, ¶ 44. The election of a new U.S. Congress and a new President in the year 2000 had an effect on this situation, and the

circumstances no longer exist, and the delay in repealing the *Act*²¹⁸ indicates that the United States is not satisfied with what it appears to regard as a WTO intrusion in its domestic issues.

In conclusion, cases of legislation violating WTO non-competition provisions are among the least likely to receive a favorable Panel and AB ruling, for the decision comprises the expansion of the WTO framework over the given antitrust matter. Nevertheless, as the *Act* decisions illustrate, those cases have merit.

2. Particular Restrictive Practices Violating WTO Non-competition Norms

In cases where particular restrictive practices violate WTO non-competition rules, there is a specific anti-competitive situation provoked by determined private parties, which affects international trade. Here, the complainant Member state tries to interpret existing WTO non-competition provisions to get a WTO remedy for the restrictive practice. This type of case has two general approaches: (i) complaining Member States seek the elimination of the restrictive practice; or (ii) they pretend to limit some of the trade distortions that the restrictive practice is producing, without affecting its existence.

(a) Violation Cases of Non-competition Provisions Aimed at Eliminating the Restrictive Practice

When faced with a specific anti-competitive behavior violating a WTO non-competition norm, the first alternative that a complaining Member has is to pursue the complete elimination of the restrictive practice. Although the European Community did not ask the Panel to eliminate what it considered a private restrictive practice in the *Bovine Hides* case,²¹⁹ the Panel made important statements regarding the burden of proof wholly relevant to this type of claim.

(i) Burden of Proof

The first step for complaining members to assert that a Member is violating a non-competition provision is to demonstrate the existence of the given private conduct.²²⁰ Circumstantial evidence will be at the core of the case to demonstrate the existence of the given anti-competitive behavior,

arbitrator recognized this by setting a period that lasted until into the year 2001.

²¹⁸ See *id.* ¶ 34. The European Communities, Japan, and the United States have agreed that this is the only way to comply with the *Act* decisions.

²¹⁹ The European Communities asked the Panel to declare that the Resolution, not the cartel itself, was WTO inconsistent.

²²⁰ See *Bovine Hides Report*, *supra* note 3, ¶¶ 11.42, 11.47. The European Communities tried to fulfill this first step in the *Bovine Hides* case.

absent other proofs not readily available before WTO Panels. Hence, the context of the respective anti-competitive practice and its effects will be among the facts available to make the inference about the presence of the practice.²²¹

The second requirement is to provide evidence of defendant Member States' direct involvement. Such involvement might either be the result of mandating the restrictive practice or of creating enough incentives for private undertakings to adopt and maintain it.²²² Without this proof, the facts remain that the restrictive business practice operates wholly independent from the given Member state, which will not be liable. The *Bovine Hides* report is an example of this. As mentioned, the European Communities were trying to use Article XI(1), a WTO non-competition provision, to solve the problem of what they considered a cartel in the tanning industry restricting exports of bovine hides. There, the Panel expressed the following:

In our view, it is possible that a government could implement a measure, which operated to restrict exports because of its interaction with a private cartel. Other points would need to be argued and proved (such as whether there was or needed to be knowledge of the cartel practices on the part of the government) or, to put it as mentioned above, it would need to be established that the actions are properly attributed to the Argentinean government under the rules of state responsibility.²²³

Proving the existence of a private restrictive practice, and the Member state's involvement, is the first part of the burden of proof. Nevertheless, it is insufficient to demonstrate a *prima facie* violation of the WTO provision. It is necessary to demonstrate, as the third part of the burden of proof, the existence of a trade distortion and that the distortion is attributable to the given private anti-competitive behavior.²²⁴ The *Bovine Hides* report stated:

[I]n the context of an alleged *de facto* restriction . . . it is necessary for a

²²¹ Specifically, WTO Panels and the AB may not have access to proofs directly obtained from executives of companies party to the restrictive practice when they decide to co-operate with certain powerful antitrust enforcers, such as Canada, the European Union, and the United States, pursuant to their leniency programs. These programs usually incorporate a duty of confidentiality that would prevent the disclosure of the information obtained. For Canada see <http://strategis.ic.gc.ca/SSG/1/ct01990e.html>; for the European Union, see <http://europa.eu.int/comm/competition/antitrust/leniency>, and for the United States, see <http://www.usdoj.gov/atr/public/criminal.htm>.

²²² See *Semi-Conductors Panel Report*, *supra* note 203, and text accompanying note 190.

²²³ *Bovine Hides Report*, *supra* note 3, ¶ 11.51.

²²⁴ See, e.g., *Bananas AB Report*, *supra* note 32, ¶¶ 252-53. This is an exception to the well-established principle that to make a *prima facie* case of violation of WTO law it is not required to demonstrate actual damage. The reason for this exception is to demonstrate that the private restrictive practice is international in character and not exclusively domestic.

complaining party to establish a causal link between the contested measure and the low level of exports. In our view, whatever else it may involve, a demonstration of causation must consist of a persuasive explanation of precisely how the measure at issue causes or contributes to the low level of exports.²²⁵

(ii) *A Comparison Regarding the Burden of Proof*

A simple comparison between restrictive practices violating, first, WTO anti-restrictive practices provisions and, second, WTO non-competition precepts, shows that the burden of proof in the former is lighter than in the latter. In the first type of dispute, the core of the case is a demonstration of the existence of the restrictive practice. It is not required, as is the case with particular situations transgressing WTO non-competition norms, to certify the existence of the respective defendant Member's involvement or the trade distortion produced or the causal link between both.²²⁶

(b) Violation Cases of Non-competition Provisions Aimed at Attenuating the Trade Effects of Restrictive Practices

Sometimes, if restrictive practices cannot be proven in their entirety, or if one or more of the above-mentioned requirements of proof are not met, it may still be possible to use WTO non-competition provisions to reduce some of the effects while leaving the private practice intact.

The European Communities successfully did this in the *Bovine Hides* case, when the Panel attenuated the possibility of some negative consequences on international trade of a restrictive private practice that the Panel did not say existed but considered likely.²²⁷ Finally, the use of non-competition provisions to attenuate the consequences of private restrictive practices is viable so long as Member States adopt measures that, although they have no bearing on the existence or maintenance of the practices, facilitate the operation of the given anti-competitive behavior. Those measures can be a subject matter for the DSB, as occurred with the Resolution in the *Bovine Hides* case.²²⁸

D. Broad Picture of the Possibilities for Development of the WTO

²²⁵ *Bovine Hides Report*, *supra* note 3, ¶ 11.21.

²²⁶ See *Telecommunications Case*, *supra* note 4, at 5. For instance, when claiming in the *Telecommunications* case that Mexico is violating Article 1.1 of the Reference Paper, the United States is simply trying to demonstrate the existence of the private restrictive practice. This Member did not argue that the practice provoked or caused a trade distortion.

²²⁷ See *supra* Part VI.C.2.(a).

²²⁸ See *supra* Part VI.

Competition Jurisprudence

Table 1 illustrates the potential richness of such WTO competition jurisprudence.²²⁹

VIII. THE CLAIMS IN *MEXICO – MEASURES AFFECTING TELECOMMUNICATIONS SERVICES*

Having analyzed the *Act* decisions and the *Bovine Hide* report and presented the possibilities for development of the WTO competition jurisprudence, it is important to analyze an ongoing competition case: *Mexico – Measures Affecting Telecommunications Services*.²³⁰ The dispute seeks to open the Mexican telecommunications market of \$ 12 billion to U.S. companies, a market still dominated by Telmex—the former monopoly supplier, now a private company. The complaint is divided into four different claims:

(i) The United States argues that the rate charged by Telmex to U.S. companies interconnecting their calls with Mexico's is unreasonable, not cost-oriented, and not sufficiently unbundled, given that the rate includes charges for network components that U.S. companies do not require to offer cross-border facilities-based services or commercial agency services.

(ii) The United States alleges that Mexico's measures do not grant U.S. basic telecommunications suppliers reasonable and non-discriminatory access to its public telecom networks and services. According to this claim, Mexico's law and regulations violate Sections 5(a) and (b) of the *Annex on Telecommunications*, because the former norms prevent Mexican basic telecom suppliers from making private leased circuits available to foreign suppliers to provide cross-border facilities-based services in Mexico. Additionally, the United States alleges that such preclusion also exists when foreign suppliers want to provide domestic or cross-border basic telecommunications services as commercial agents, namely, when foreign suppliers provide telecom services over lines they lease from facilities-based suppliers.

(iii) In the United States' view, Mexico's measures do not provide national treatment to U.S.-owned commercial agencies. The United States believes that Mexico's telecommunications legislation prevents foreign-owned commercial agencies located in the United States or Mexico from obtaining private leased circuits or from connecting them to foreign networks, thus making it impossible for such companies to

²²⁹ See Table: WTO Competition Jurisprudence, *infra* p. 511.

²³⁰ *Telecommunications Case*, *supra* note 4.

provide these services in Mexico and across its borders. Such preclusion does not exist for Mexican facilities-based telecommunications service suppliers, which are able to lease to each other for cross-border and domestic telecom services and can connect the lines they lease to foreign networks so as to furnish such services. On this basis, the United States concludes that such different treatment is inconsistent with Mexico's commitments under Articles XVIII:1, XVIII:2, and XVIII:3 of the GATS.

(iv) Finally, the United States deems that Mexico's measures do not prevent Telmex from engaging in anti-competitive practices. The last claim in this case is an antitrust one and consists of two arguments. First, Mexico's norms grant Telmex the possibility of engaging in monopolistic practices regarding interconnection rates for cross-border basic telecommunications services and endow the company the greatest portion of the revenue obtained because of this charge, no matter how many calls Telmex interconnects from abroad. Second, the United States alleges that Mexican legislation, by providing that Telmex has the exclusive authority to negotiate the interconnection rate that not only Telmex itself but all other Mexican suppliers will charge to foreign suppliers to interconnect telephone calls from outside Mexico, creates a cartel, because other Mexican suppliers must incorporate the rate negotiated by Telmex into their interconnection agreements with foreign basic telecommunications suppliers. The United States deems that by doing so, Mexico violates Section 1.1 of the Reference Paper.²³¹

A categorization of each of these claims reveals that the first is a claim of a particular behavior violating a WTO pro-competition provision. The second is a claim of legislation as such violating the above-mentioned type of WTO norms. The third is not a competition claim but one related to traditional GATT and WTO national treatment disputes. Finally, the fourth involves a claim of a particular behavior and a claim of legislation opposing WTO mandatory anti-restrictive practices provisions.

This is, based on the provisions alleged violated, the least troublesome of all the previous competition cases. First, concerning the claims that deal with the violation of WTO pro-competition and mandatory anti-restrictive practice provisions, the Panel and the AB, on appeal, will be applying WTO law to issues already incorporated within the WTO framework. Consequently, providing a WTO remedy to the competition issues of the *Telecommunications* complaint will likely be seen as the normal application of what Members agreed upon in the *Annex on Telecommunications* and the Reference Paper.²³² Second, the burden of proof is less heavy than in any

²³¹ See *id.*

²³² Charges to the judicial framework of the DSB of adding to or diminishing the rights

other competition complaints, because it is based on violation of WTO pro-competition and mandatory anti-restrictive practices provisions.²³³ Third, the *Telecommunications* Panel might draw on other international practice regarding interconnection in telecommunications in order to ground its ruling.²³⁴ The presence of these factors does not signify that the demonstration of the *prima facie* violation by the United States is an easy task, because it is not.²³⁵ This is the first case based on the *Annex on Telecommunications*, and this poses additional difficulties regarding how the Panel and the AB will assume the task of providing content to the set of broad terms contained in the *Annex* and in the Reference Paper.²³⁶ Despite

and obligations of WTO membership, based on Articles 3.2 and 19.2 of the DSU would be unlikely.

²³³ See *supra* Parts VI.B.2(a) and (b) for an analysis of the burden of proof in claims involving factual practices violating WTO pro-competition and WTO mandatory anti-restrictive practices provisions.

²³⁴ During the negotiations of the Reference Paper some countries, specifically the United States and the members of the European Union, incorporated terminology already existing in the US Telecommunications Act and the EU Interconnection Directive, hoping that this would allow WTO Panels to make use of the past experience regarding interconnection in these countries. See Sherman, *supra* note 160, at 61.

²³⁵ Rohlfs and Sidak have recently shown the type of problems that the United States must overcome in order to succeed in international telecommunications disputes. These authors criticize the policies and methodologies that the United States is pursuing or defending, by showing how they have been strongly questioned in the United States and how they cannot be transferred easily to other markets. These authors maintain the following in relation to the United States and Japan dispute related to interconnection rates in the Japanese market, but which is also wholly applicable to the *Telecommunications* case:

[F]or more than six years, many American experts on telecommunications policy have disagreed whether American consumers have benefited from the very FCC policies that the USTR would have Japanese regulators emulate. The USTR's initiative appears to ignore that the transition to cost-oriented rates for interconnection and retail telecommunications services has been a difficult and unfinished process in the United States; that the cost models used by the FCC to set interconnection prices have significant deficiencies; that actual interconnection prices both within and outside the United States diverge considerably from the estimates of the FCC's cost models; that variations across countries in the prices of inputs have a significant effect on the costs of interconnection; and that, with respect to depreciation in particular, regulators treat this cost differently.... Such substantive economic considerations suggest why the FCC's policy in this area has generated continuous litigation, including two Supreme Court cases since 1996, and consequently is too unresolved at this point in the American experience for the United States to force on its trading partners.

Jeffrey R. Rohlfs & J. Gregory Sidak, *Exporting Telecommunications Regulation: The United States-Japan Negotiations on Interconnection Pricing*, 43 HARV. INT'L. L. J. 317-18 (2002).

²³⁶ The negotiators of the Reference Paper expressly avoided defining certain terms regarding interconnection, such as reasonable, timely, cost-oriented, economic feasibility, and sufficient unbundled, in order to leave the determination of their meaning in the hands of

the fact that the alleged violated norms are WTO pro-competition and mandatory anti-restrictive practices provisions, there is room for either the *Film* or the *Act* approach or a combination of both. Finally, the economic stakes in this case are high, and so is the likelihood of appeal. Thus, it will be interesting to see how the AB gauges the reactions to its *Act* report and the rest of the WTO competition jurisprudence, and how it uses its *Telecommunications* ruling to respond to them.

IX. CONCLUSION

WTO competition jurisprudence is slowly emerging, and its theoretical possibilities for development are rich. This jurisprudence began to emerge with the Panel decision in *Japan – Measures Affecting Consumer Photographic Film and Paper*²³⁷ and the ratification of its approach by the AB in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*,²³⁸ and it continued with the Panel's and AB's reports in *United States – Anti-Dumping Act of 1916*²³⁹ and the Panel report in *Argentina – Measures Affecting the Export of Bovine Hide and the Import of Finished Leather*.²⁴⁰ Finally, it will have the next ruling in the forthcoming Panel report *Mexico – Measures Affecting Telecommunications Services*.²⁴¹

This paper delved into the analysis of these decisions in order to present the major trends in the existing WTO competition jurisprudence as a whole: first, the self-restrained trend, following the lines and spirit of the *Film Report*, and second, the activist approach set forth by the *Act* rulings.

After the ratification of the *Film* approach by the AB in its *Asbestos* report, the development of competition jurisprudence will not be expected in non-violation nullification and impairment cases, but in violation disputes, such as the *Act* and the *Bovine Hides* cases, brought before the DSB through the mechanism of Article XXIII.1(a). Panels and the AB on appeal will find a more favorable environment to provide a WTO solution for the competition problem when they have violation cases based on WTO pro-competition and WTO mandatory anti-restrictive practice provisions. Indeed, the sole existence of a provision of these sorts removes many of the political hurdles that a Panel and the AB face when deciding a competition case.

The judicial framework of the DSB may be starting to have complete view of the place that private parties occupy within the WTO, and this

dispute settlement. See Sherman, *supra* note 160, at 80.

²³⁷ See *supra* note 2.

²³⁸ See *Asbestos AB Report*, *supra* note 93.

²³⁹ See *supra* note 3.

²⁴⁰ See *supra* note 4.

²⁴¹ See *supra* note 5.

complete view could be at the origin of the new *Act* approach. Indeed, Panels and the AB have backed and strengthened a line of jurisprudence protecting private parties' interests created by past GATT practice.²⁴² Thus, it is understandable that the judicial framework of the DSB has started to construct with the *Act* rulings another course, in which it simply recognizes that private companies may have to pay a price when using, or abusing, the benefits of the trading system by means of anti-competitive actions weakening it.

The *Act* decisions also indicate that the judicial framework of the DSB seems to consider that, nearly a decade after its creation, it has enough legitimacy to be less conservative regarding competition matters under certain exceptional circumstances, all while maintaining its traditional prudence when interpreting WTO precepts. In fact, the *Act* approach in no way means that self-restraint is over regarding competition within the WTO and that WTO Panels and the AB will not be the ones providing solutions to all kinds of international competition issues. Furthermore, the coexistence of both approaches is marking the evolution of the WTO competition jurisprudence at both levels: at the level of specific decisions, as the *Bovine Hides* Panel report betokens, and at the level of the jurisprudence as a whole, taking together all the existing rulings.

Finally, the circumstances seem favorable for some competition cases appearing before the DSB and thus for the development of WTO competition jurisprudence. The U.S. administration opposes the incorporation of competition within the WTO,²⁴³ and without this support, any agreement is difficult to envision in the near future. Therefore, some Member States, like the European Communities and Japan, may want to incorporate competition issues within the WTO framework and do their best to continue, under the current WTO limitations, to present some competition cases in WTO terms before the DSB. WTO competition litigation may become an alternative for the absence of or deadlocked negotiations.

Viewed from a more general perspective, such limited activism in competition matters is another expression of two wider processes that are taking place in and outside the WTO. Within the WTO, it is clear that the AB is determined to enhance its institutional powers and, in general, that of the WTO judiciary. Its *Act* report was issued a few months after two high-profile decisions: *Turkey – Restrictions on Imports of Textile and Clothing Products*,²⁴⁴ and *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, where the AB showed not only activism but also a lack of fear of clashing with the WTO political

²⁴² See *supra* Part IV.

²⁴³ See International Competition Policy Advisory Committee, *supra* note 29.

²⁴⁴ WTO Doc. WT/DS34/AB/R (Oct. 22, 1999).

bodies, openly defying WTO Members.²⁴⁵ Judges challenge conventional wisdoms in order to strengthen their reputation.²⁴⁶ Their only question is finding the right time to do so. The first years of the operation of the Panel system and AB have brought about a general recognition of sound legal reasoning and results, and the feeling of success marks the great majority of evaluations. Now, with a secure place in the world trade arena, the AB seems to consider that it can safely embark upon a certain activist path when it thinks it is necessary for the trading system.

This phenomenon is wholly consistent with another pattern emerging in international law, that analysis goes beyond the scope of this paper: the increasing importance and activism of international tribunals. As Sands maintains, the creation of regional and global judicial institutions during the last two decades has generated new scenarios for international litigation, that's direct result is that "this new judiciary has taken life of its own and has already, in many instances, shown itself unwilling to defer to traditional conceptions of sovereignty and state power."²⁴⁷ Thus, AB's activism is embedded in this wider and undergoing international pattern. What we can expect from it is not bold and reiterated AB's decisions pushing the limits of the WTO judiciary's jurisdiction and of WTO law, but rather a well-grounded activism carefully chosen in terms of timing and subject matter,

²⁴⁵ One could state that the period from October 1998 to 2001 marked a turning point in the institutional life of the AB. In general, before October 1998, the AB was doing its job without taking risks too often. From this month, and during the next two years, the AB embarked on open activism and was testing how far it could go in interpreting WTO law. We suggest that this period started in October 1998 because it is the time when the AB issued its report in *United States – Import Prohibition of Certain Shrimp and Shrimp Products* where, as is widely known, it acknowledged the possibility for private parties to submit *amicus curiae* briefs and the discretion for Panels to accept them or not. See WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* WTO Doc. WT/DS58/AB/R (Oct. 12 1998) ¶¶ 100–10. Later in October 1999 came the above-mentioned AB's report in *Turkey – Textile* (*supra* note 63), and *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products* (*supra* note 63). A year later, the AB rendered its *Act* report (Oct. 2000), and five months later issued another controversial report in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen From India* (WTO Doc WT/DS136/AB/R (March. 12 2001) declaring that zeroing, a well-established practice in the application of anti-dumping laws in Canada, the European Communities, and United States, whose effect is to increase dumping margins in most cases, was inconsistent with the *Anti-Dumping Agreement*. This is by far the most controversial decision regarding the foregoing Agreement, and it upset these powerful Members. For an assessment of this report, see in favor, James P. Durling, *Deference, But Only When Due: WTO Review of Anti-Dumping Measures*, 6 J. OF INT'L. ECON. L. 125, 136 (2003). But see against, John Greenwald, *WTO Dispute Settlement: An Exercise in Trade Law Legislation?*, 6 J. OF INT'L. ECON. L. 113, 118–20 (2003).

²⁴⁶ See Duncan Kennedy, *Freedom and Constraint in Private Adjudication: A Critical Phenomenology*, 36 J. OF LEGAL STUD. 518, 588 (1986).

²⁴⁷ Philippe Sands, *Turtles and Torturers: The Transformation of International Law*, 33 N.Y.U.J. INT'L L. & POL. 527, 553 (2001).

along with more traditional interpretations of the covered agreements whose end result is the steady emergence of a reputed and powerful WTO judiciary.

Table: WTO Competition Jurisprudence

| Type of Mechanism of Access to DSB | Type of WTO Norm Invoked as Violated | Type of WTO Competition Norm Invoked as Violated | Type of Situation Violating the WTO Norm | Objective of the Claiming Member | Burden of Proof |
|---|---|---|---|----------------------------------|---|
| Direct Violation of WTO norms [Act, Bovine Hides, and Telecommunications cases] | | WTO procompetition provisions [Telecommunications case] | Legislation as such violating WTO procompetition provisions. [Telecommunications case] | | Existence of legislation preventing the presence of the required procompetitive private practice, |
| | Direct Violation of WTO norms | | Particular Behavioral p violating WTO Pro-competition provisions [Telecommunications case] | | Absence of the required procompetitive private practice, No government involvement required. |
| | Competition Norms [Telecommunications and Bovine Hides cases] | WTO mandatory anti-restrictive practices provisions [Telecommunications case] | Legislation as such violating WTO mandatory anti-restrictive practices Provisions [Telecommunications case] | | Existence of legislation condoning the existence of a private restrictive practice (PRP). |
| | | | Particular Behavior violating WTO anti-mandatory restrictive practices [Telecommunications case] | | 1. Presence of the given PRP. 2. Proof of the government involvement with the PRP is not required. |
| | | | Antitrust legislation violating WTO non-competition provisions [Act case] | | To demonstrate that the given antitrust issue is covered by a WTO non-competition provision. |

| | | | | |
|--|--|---|---|---|
| | Direct violation of non-WTO competition norms [<i>Act</i> case] | Specific private restrictive practices violating WTO non-competition Provisions [<i>Bovine Hides</i> case] | Eliminating the PRP. | Existence of a PRP. Government involvement with the PRP. Trade distortion Causality between 2-3. [<i>Bovine Hides</i> case] |
| | | | 2. Attenuating the effects of the PRP [<i>Bovine Hides</i> case] | |
| Non-violation nullification and impairment cases [<i>Film and Asbestos</i> cases] | | | | (1) if the practices is a government measure; (2) if so, whether the given measure related to a benefit reasonably anticipated to accrue from prior tariff concessions by upsetting the competitive relationship between imports and domestic products; and (3) if the benefit accruing to the complaining Member is nullified or impaired by the measure |

