LITIGATION OF LATIN AMERICA AND CARIBBEAN COUNTRIES AT THE WORLD TRADE ORGANIZATION (WTO) AND UNDERLYING COMPETITION ISSUES

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INTRODUCTION

Perhaps few would question the proposition that WTO disputes involving competition law and policy *sensu stricto* are few and far between, not only because of the absence of a multilateral framework on competition law and policy enforceable at the WTO, but also because there are few disputes involving the application of Article VIII of GATS, an arguably piecemeal, if modest attempt, for the promotion and development of a competition regime within domestic legal system of WTO Members.

Arguably, therefore, any discussion of WTO disputes involving underlying competition issues warrants a reconsideration of competition issues implicated in not only core obligations such as MFN and national treatment, but of provisions of some of the annexed WTO Agreements, including the Anti-dumping Agreement, the Subsidies Agreement, the Agreement on Safeguards, the TBT Agreement and the SPS Agreement.

In considering the experience of Latin American and Caribbean countries, the article provides, first, some definition of terms including competition law and policy; how these definitions may be correlated with core provisions of the WTO Agreement and specific annexed agreements; and finally, a selected list of WTO disputes involving Latin American and CARICOM countries, and the extent to which the interests of these countries have been vindicated through these disputes in clarifying new and old disciplines implicating competition concerns.

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COMPETITION LAW AND POLICY

Competition law and policy refer to the body of laws, regulations, and administrative practices regulating and informing decisional practices and outcomes of competition authorities, other enforcement agencies, including private enforcement, and the companies to which these laws and regulations are directed to ensure the development and maintenance competitive market structures or the avoidance or elimination or diminution of anti-competitive conduct.

Although competition law is distinct from competition policy as in the case of, with respect to the latter, advocacy progammes to inform modification of existing competition laws or to generate a competition culture amongst stakeholders, competition law is hardly divorced from a competition policy reflected therein, whether this be for regional integration purposes, producer interests, consumer interests, or underlying efficiency and development concerns, or a combination of the above.

For the term competition policy a definition by Bernard Hoekman and Peter Holmes is offered in the following terms:

Competition policy has a much broader domain. It comprises the set of measures and instruments used by governments that determine the "conditions of competition" that reign on their markets. Antitrust or competition law is a component of competition policy. Other components can include actions to privatize state-owned enterprises, deregulate activities, cut firm-specific subsidy programs, and reduce the extent of policies that discriminate against foreign products or producers. Often the competition policy stance of a government may be determined in part by the international treaties it is a party to, including e.g., regional integration agreements. A key distinction between competition law and competition policy is that the latter pertains to both private and government actions, whereas antitrust rules pertain to the behavior of private entities (firms).[1]

Although the above definition captures some of the essential features of the distinction between competition law and policy, there are a few observations worth noting for a more accurate depiction of the distinction. First, competition policy may also exclude, that is, by defining the domain of competition in a market it determines who can enter the market to compete, and who are to be excluded. Thus, competition policy need not be pro-competitive as in the case of privatization or de-regulation activities.

[1] Bernard Hoekman and Peter Holmes, 'Competition Policy, Developing Countries and the WTO' (September 1999), p.2. FEEM Working Paper No. 66-99. Available at SSRN: http://ssrn.com/abstract=200621

Additionally, competition rules need not be limited to the behavior of private firms exclusively. In some jurisdictions, for example Jamaica, the governing competition law, the Fair Competition Act, 1993, expressly applies to the Crown, which could include public or government owned entities assimilable to the state and to the extent that their functions are of a market participating character as distinct from the exercise of purely regulatory functions.[2]

Moreover, with the spread of regional trade agreements and the increasing incidence of the inclusion of competition provisions in such agreements, competition law and policy now involve obligations in regional trade agreements for national governments, and may include the obligation to institute competition legislation and completion authorities, thereby delimiting the definition of competition law to what domestic law provides.

RELATIONSHIP OF COMPETITION LAW AND POLICY TO CORE WTO OBLIGATIONS

While there are conceptual differences between competition law and policy and market access, the core WTO obligations such as MFN and national treatment are in the main obligations for which competition concerns are central.

As the Appellate Body noted with respect to the national treatment obligation in *Japan – Taxes on Alcoholic Beverages II:*

'*Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products …. Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products. …*'[3]

According to the AB the underlying rationale of Article III is equality of competitive conditions whereby expectations of equal competitive relationship between domestic and imported products are protected.

This objective was also identified by the AB in *Korea-Alcoholic Beverages* whereby the AB stated the objective as 'avoiding protectionism, requiring equality of competitive conditions and protecting expectations of equal competitive relationship'.[4]

And, in relation to the MFN obligation, in GATS, which is similar in terms to the MFN obligation in Article I:I of GATT 1994, the Appellate Body has stated that:

[2] Fair Competition Act of Jamaica, 1993, s. 53.
[3] AB Report, *Japan-Taxes on Alcoholic Beverages II*, WT/DS /AB/R, October 1996, at 109 and 110.
[4] AB Report, Korea-Alcoholic Beverages, para. 120.

'*The obligation imposed by Article II is unqualified. The ordinary meaning of this provision does not exclude de facto discrimination. Moreover, if Article II was not applicable to de facto discrimination, it would be difficult-and indeed, it would be a good deal easier in the case of trade in services than in the case of trade in goods-to devise a discriminatory measures aimed at circumventing the basic purpose of that Article*.'[5]

By this statement the AB rejected the EC's submission that that unlike Article II:1 of GATS, Article XVII of GATS on national treatment makes specific reference to de facto discrimination and that if the negotiators intended de facto discrimination to apply to the MFN obligation they would have said so explicitly.

Therefore, the purpose of the provision is to secure equality of competitive opportunity for services and service suppliers.

The same is true in respect of the transparency obligation reflected in Article X of GATT providing, *inter alia*, for the publication of laws and other measures having an effect on trade and the administration in a uniform, impartial and reasonable manner of a Member's laws, regulations, decisions and rulings.

At bottom, therefore, the core obligations relate to competitive opportunities to be realized under the WTO Agreement, if not strictly in the antitrust use of the term.

RELATIONSHIP OF COMPETITION LAW AND POLICY TO WTO AGREEMENTS

The importance of competitive opportunities is also observable in the provisions of other WTO Agreements. The annexed agreements often include some of the core provisions such as MFN, national treatment, and transparency and to that extent the observations made in respect of GATT are also applicable.

In the WTO Antidumping Agreement (ADA), the concept of dumping includes an element of pricing below cost in the country to which the exports are destined, and the price differential as between the domestic price and the export price producing the dumping margin that causes injury reflects arguably a disadvantage in competitive opportunities for firms in the export market that are facing the injury.

[5] AB Report, EC-Bananas III, para. 233.

In the case of the WTO Subsidies Agreement (ASCM), prohibited subsidies are in the main considered to be trade distorting putting countries at a disadvantage with respect to their competing domestic goods or competing exports.

In the Safeguards Agreement (SA), safeguards duties are to be applied on an MFN basis. In addition, the requirement for the observation of the principle of parallelism in the application of safeguard measures suggests a concern against discrimination and the implications for disadvantages in competitive opportunities.

Underlying competition concerns are also addressed in Article 11.3 of the SA, whereby voluntary export restraints are forbidden. Article 11.3 of the SA provides that:

'*Members shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph 1.*'

And, 11.1 (a) and (b) of the SA provide that:

a) A Member shall not take or seek any emergency action on imports of particular products as set forth in Article XIX of GATT 1994 unless such action conforms with the provisions of that Article applied in accordance with this Agreement.

(b) Furthermore, a Member shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or the import side.) These include actions taken by a single Member as well as actions under agreements, arrangements and understandings entered into by two or more Members. Any such measure in effect on the date of entry into force of the WTO Agreement shall be brought into conformity with this Agreement or phased out in accordance with paragraph 2.

This provision would doubtless capture import and export cartels and, arguably, the terms 'encourage and support' in Article 11.3 of the SA can accommodate positive action as well as inaction which has the same effect.

Underling competition principles are also included in other agreements such as TRIPS, GATS, the TBT Agreement, and the SPS Agreement whereby the core non-discrimination principles of GATT are incorporated.

Beyond, core GATT obligations and the underlying competition concerns implicated in these obligations, some of the annexed agreements include core competition provisions such as GATS. Article VIII of GATS, for example, provides that:

1. Each Member shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Member's obligations under Article II and specific commitments.

2. Where a Member's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Member's specific commitments, the Member shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.

3. The Council for Trade in Services may, at the request of a Member which has a reason to believe that a monopoly supplier of a service of any other Member is acting in a manner inconsistent with paragraph 1 or 2, request the Member establishing, maintaining or authorizing such supplier to provide specific information concerning the relevant operations.

4. If, after the date of entry into force of the WTO Agreement, a Member grants monopoly rights regarding the supply of a service covered by its specific commitments, that Member shall notify the Council for Trade in Services no later than three months before the intended implementation of the grant of monopoly rights and the provisions of paragraphs 2, 3 and 4 of Article XXI shall apply.

5. The provisions of this Article shall also apply to cases of exclusive service suppliers, where a Member, formally or in effect, (a) authorizes or establishes a small number of service suppliers and (b) substantially prevents competition among those suppliers in its territory.

Additionally, Article IX of GATS provides that:

1. Members recognize that certain business practices of service suppliers, other than those falling under Article VIII, may restrain competition and thereby restrict trade in services.

2. Each Member shall, at the request of any other Member, enter into consultations with a view to eliminating practices referred to in paragraph 1. The Member addressed shall accord full and sympathetic consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question. The Member addressed shall also provide

other information available to the requesting Member, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the requesting Member.

Although these provisions in the GATS do not provide for the establishment of a comprehensive regime of competition law for WTO Members in the sense of a minimum threshold of anti-competitive conduct to be covered, it is difficult to envisage the satisfaction of the obligation in Article VIII of GATS without some semblance of a competition law being instituted in the domestic law of WTO Members.

Where this is done, the governing competition law can be challenged 'as such' or as applied. On the other hand, the omission to put a sufficient competition regime in place to comply with Article VIII of GATS would also be actionable given Article XVI: 4 of the WTO Agreement whereby WTO Members are enjoined to implement their WTO obligations in good faith and to 'ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements'.

Instances whereby the governing competition legislation can be challenged as such could include a breach of Article III: 4 of GATT 1994, that is, the national treatment obligation regarding non-fiscal regulations.

Article III: 4, first sentence, provides, for example, that:

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

To the extent that the competition legislation is origin-neutral with regard to the products or the conduct of firms to which it applies, there may no basis for an 'as such' challenge to the legislation. Few competition legislation would be drafted in terms that are facially discriminatory whereby, for example, exemptions from actionable anti-competitive conduct otherwise proscribed under the legislation apply only in respect of domestic firms.

It may be that a more likely occurrence would be discrimination in the application of the competition legislation in individual cases or the non-application of the competition legislation in selected cases.

An instance of this is a decision of the competition authority to take action against an anti-competitive agreement providing for the exit of a competitor involving a foreign firm,[6] but refusing to act against a similar anti-competitive agreement involving domestic firms only.

A second example, is a decision of the competition authority authorizing an exclusive distribution agreement to the benefit of a domestic producer, whilst prohibiting a similar distribution agreement for like imported goods. Or, the decision may be one whereby the competition authority refuses to act against a domestic buying cartel refusing to buy imports.

WTO DISPUTES INVOLVING LATIN AMERICAN AND CARICOM COUNTRIES

Given the relationship between core WTO obligations and underlying competition concerns one may examine the many WTO disputes involving Latin American and CARICOM countries involving these core obligations. Moreover, disputes in relation to the specific annexed WTO Agreements usually invoke core GATT obligations or the core GATT obligations included in these annexed agreements as well.

Of the WTO disputes since the creation of the WTO, Latin American and Caribbean countries have been involved in 112 disputes as a complaining party, 87 disputes as a responding party and as third parties to disputes over 300 times. The region is considered to be among the most active developing regions using the WTO dispute settlement system covering several agreements.[7]

To the extent that Latin American and CARICOM countries have engaged the WTO dispute settlement system as complainants, their likelihood of success increases perhaps because the claims usually allege violations of several provisions of an agreement whereby a finding of violation of any one provision is a sufficient basis for a recommendation for a withdrawal of the offending measure.

[6] Assuming here that the competitor exiting the market under the agreement is the foreign firm and the implication for the exclusion of its products from the domestic market.

[7] See, Tania Garcia-Millan, 'Latin America's experience in dispute settlement within the WTO: the cases of Technical standards, Sanitary and Phyto-sanitary measures and Intellectual property', Study prepared by the Division of International Trade and integration of the Economic Commission for Latin America and the Caribbean (ECLAC), November, 2011.

On the other hand, where Latin American and CARICOM countries appear as respondents their success rate at the WTO is reduced since there is more likely than not to be a finding that there is a breach of one or more of the many applicable provisions pleaded with respect to the challenged measure.

On this view, the interests of Latin American and CARICOM countries advances, in terms of their success rate at the WTO, to the extent that they appear as complainants as against respondents or as third parties supporting other complainants.

For our purposes, I have selected three cases for discussion, namely the *Telmex* decision,[8] *Antigua-Gambling*,[9] and *Brazil-Retreaded Tyres*.[10] Given that competition concerns are directly addressed in the GATS it is perhaps fitting to see how the WTO has, for the first time, addressed the enforcement of competition law in the strict sense in accordance with the GATS as was done in *Telmex*.

Antigua-Gambling, is important for a number of reasons. It involves a small CARICOM country challenging the US, epitomizing a David against Goliath contest; the case represents the first to examine cross border trade in electronic services; and, perhaps, the first, to provide an opportunity to assess implementation issues for a small developing country prevailing against the US.

Brazil-Retreaded Tyres, on the other hand, represent a basis for examining deep systemic issues within the WTO, particularly relating to regulatory autonomy in the context of domestic and regional measures sought to be justified under Article XX of GATT. It is also the first to examine a trade restrictive measure by a developing country justified on environmental grounds.

ENFORCING MARKET ACCESS VIA ANTRITRUST POLICY: A COMMENT ON THE WTO'S *TELMEX* DECISION

Within the WTO market access and anti-trust policy may be seen as strange bedfellows, given the lack of agreement on the inclusion of competition matters within the multilateral framework as part of the Singapore issues, [11] but also because the WTO is largely seen as presiding over rules that discipline state

[8] *Mexico-Measures Affecting Telecommunications Services*, WT/DS204/R..
[9] *United States-Measures Affecting the Cross-border Supply of Betting and Gambling Services*, WT/DS285/AB/R.
[10] *Brazil-Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007.
[11] Although the Ministerial Conference in Singapore (1996) established a Working Group for the study of the interaction of trade and competition policy, and this was followed up in Doha (2001) with respect to a clarification of the mandate of the Working Group, the issue was subsequently taken off the agenda in accordance with a decision of the General Council. See, for example, Decision adopted by the General Council on 1 August 2004, WT/L/5792.

conduct as opposed to private conduct.[12] In a Panel decision in 2004, *Mexico-Measures Affecting Telecommunications Services*,[13] the first to address the General Agreement on Trade in Services (GATS), the WTO seemed to have put to the forefront the convergence of multilateral anti-trust enforcement and market access commitments as a significant part of its mandate for the liberalization of trade in services.

The decision, however, raises concerns of whether market access and anti-trust principles can be effectively combined within the WTO context to promote liberalization without a multilateral framework for competition policy, given the mandate of Panels stipulated in Article 3:2 of the Understanding on Dispute Settlement (DSU).[14]

Admittedly, the WTO Agreement contains competition provisions in several of the covered agreements,[15] but there is no comprehensive framework for the merging of anti-trust and market access principles for enhanced liberalization. What exists is a piecemeal approach that is largely reflected in GATS that, as will be shown below, may have greater implications for the multilateral trading system and domestic regulatory discretion than what was originally intended.

Convergence of the two disciplines to ensure greater liberalization is regarded as significant because of hybrid public/private restraints to trade that may nullify market access commitments guaranteed by states under GATT rules that are largely concerned with public or state restraints to trade.

Below I address the effectiveness of this merging from the standpoint of the Panel's anti-trust analysis bearing in mind that for some GATS provisions a finding of an antitrust violation is a requirement for a presumption or finding of nullification and impairment of market access commitments.

Background

The decision concerned a complaint by the United States against Mexico that it violated its GATS commitments by failing to ensure that Telmex, the once state owned but dominant telecommunications

[12] Private conduct may however be disciplined by WTO rules where there is sufficient government involvement that makes the private conduct a state conduct. See for example, *Japan-Trade in Semi-Conductors*, May 4, 1988, G.A.T.T. B.I.S.D. (35TH Supp.) at 155, 1989, (decision adopted May 4, 1988).
[13] WT/DS204/R, hereafter, the *Telmex* case.
[14] This provides that in the interpretation of the covered agreements there should be no addition to or diminution of the rights and obligations assumed by WTO Members.
[15] See, for example, M. Matsushita, 'Basic Principles of the WTO and the Role of Competition Policy' *Wash University Global Studies Law Review*, p. 369, 2004.

company in Mexico, provide interconnection to U.S. telecommunications suppliers at 'cost oriented' rates and not engage in anti-competitive practices. The U.S. also alleged that Mexico did not provide U.S. telecommunications suppliers 'reasonable and non-discriminatory access' to public telecommunications networks and services as required by the GATS Annex on Telecommunications.

The U.S. complaint arose from Mexico's International Long Distance Rules (ILD) that permitted Telmex to set and charge a uniform interconnection rate for terminating calls to Mexico from the U.S. at prices that were considered excessive and which, because Telmex was authorized to set a settlement rate that was binding on other telecom suppliers in Mexico, was alleged to be a price –fixing cartel operated at the behest of the Mexican government.

The legal framework

The GATS contains provisions that stipulate minimum core obligations for WTO Members with respect to competition matters. Article VIII, for instance, enjoins WTO Members to prevent abuse by monopolies in service industries for which specific commitments for liberalization are made, and to ensure that monopoly rights are not exercised in breach of most favoured nation (MFN) obligations.

The obligations allegedly breached by Mexico are contained in the GATS Annex on Telecommunications, the accompanying *Telecommunications Reference Paper* (TRP), and the Schedule of Specific Commitments. In accordance with Article XXIX of the GATS, the Annexes are an integral part of the GATS, and Article XX.3 provides that the specific commitments assumed in the Schedule of Commitments are an integral part of GATS.

Section 5 (a) of the GATS Annex on Telecommunications requires WTO Members assuming these commitments, to ensure that " any service supplier of any other Member is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions…"

By contrast, the TRP defines a major supplier in the following terms:

A major supplier is a supplier which has 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

Section 1 of the TRP addresses competitive safeguards and is in the following terms:

1.1 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.

Was Telmex a Major supplier?

The Panel found Telmex to be a major supplier because it satisfied the definition in the WTO Reference Paper, as set out above, that is, "a major supplier is a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunication services…" The Panel referred to Mexico's International Long Distance Rule (ILD) Rule 13 that authorized Telmex to negotiate settlement rates for the Mexican market for termination of southbound calls from the U.S. ILD Rule 13 provided that "the long distance service licensee having the greatest percentage of the outgoing long distance market share for the six months prior to negotiations with a given country shall be the licensee that is authorized to negotiate settlement rates with the operators of said country".[16]

For the Panel the relevant market was the market for terminating southbound calls and not point to point connection that would include northbound calls from Mexico to the U.S. Here, the Panel relied on the U.S.'s submission which drew on the determination by the competition authority in Mexico that treated southbound calls as a relevant geographic market.

The Panel referred to demand and supply substitutability in addressing the issue of the appropriate product and geographic market, but its approach was cursory. It simply said it found no evidence that

[16] Cited In Panel Report at 4.

'…an outgoing call is considered substitutable for an incoming one'. True enough, Mexico had provided no such evidence, claiming instead there was no market for termination services and that the settlement rate was in accordance with a traditional accounting rate regime that took account of two way traffic. That said, the standard analysis of the market was not conducted, and the Panel's approach seemed to have been less than adequate for the conclusion reached.

Did Telmex engage in anti-competitive practices?

Next, the Panel addressed the question of whether Telmex engaged in anticompetitive practices within the context of the Reference Paper. Relying on dictionaries, it defined anticompetitive practice to mean a practice 'tending to reduce or discourage competition'. It then characterized the uniform settlement rate fixed by Telmex and financial compensation agreements as a horizontal price fixing and market sharing arrangement tantamount to a cartel. The compensation agreements were designed to ensure that carriers accepted no more than their proportionate share of incoming calls as related to their outgoing calls unless they paid for the right to accept more than their quota.

The Panel observed that there is no reference to horizontal price fixing and market sharing arrangements in the Reference Paper but regarded the practice as being covered because the Reference Paper includes in the definition of 'anti-competitive' 'engaging in anti-competitive cross-subsidization' and the list is non-exhaustive and includes pricing issues. This finding was also bolstered by ILD Rules requiring international gateway operators to distribute among themselves incoming calls from a country in proportion to the outgoing calls the operator sends to that country, and to negotiate compensation agreements in accordance with the proportion agreed on if the calls are not distributed accordingly.
A further basis for this reasoning is that the legislation of many WTO Members prohibit such practices i.e. horizontal price fixing and market sharing arrangements.

The Reference Paper refers to three examples of anti-competitive practices that concern exclusionary action by a dominant firm. These are anti-competitive cross-subsidization, use of competitors' information with anti-competitive results, and not making available to other service suppliers on a timely basis technical information about essential facilities and commercially relevant information necessary for them to provide service.

That these are largely limited to exclusionary practices raises the question of whether the price fixing and market sharing arrangement sanctioned by the ILD Rules had the effect of preventing competitors from providing the service within Mexico as suppliers with the ability to terminate southbound calls.

This does not seem to have been the case since affiliates of AT&T and WorldCom, Alestra and Avantel, were at the time of the WTO case, operating their own fibre optic long distance cables that US carriers could have used to transport southbound calls from the US.[17]

There was also little basis on which to claim that the practices being proscribed domestically were prohibited under GATS as a reflection of what WTO Members understood these anti-trust obligations to mean at the time of the agreement. This is so because the panel's ruling in effect amounted to a ban on export cartels for which there is yet an agreement at the multilateral level. A ban on export cartels because the termination service at issue supplied by Telmex was an export and not an import, that is, Mexico was in effect selling or exporting its termination service and had put a 'cartel' together for that purpose. But there was no agreement under GATS with respect to export cartels. Indeed, the negotiating position of the US, on that understanding, is reflected in the fact that it maintains no prohibitions against export cartels, but rather exempts them under their Webb Pomerene Export Trade Act 1918[18], provided there is no anti-competitive spill over effect within their economy. Moreover, Mexico had not made any commitments under GATS with respect to exports.

Was the settlement rate cost oriented?

In addressing this question the Panel relied on the Long Run Average Incremental Cost (LRAIC) as the appropriate benchmark for cost oriented settlement rates. The Panel concluded that 'cost oriented' means "the costs incurred in supplying the service, and that the use of long term cost incremental methodologies, such as those required in Mexican law, is consistent with this meaning."[19] Apart from relying on the legislation in Mexico to support this interpretation, the Panel also referred to Article 31.4 of the Vienna Convention to determine the special meaning to be attributed to 'cost-oriented' as used by the International Communication Union (ITU). It found that the special meaning attributed to the term

[17] Gregory Sidak, and Hal Singer, Uberregulation without Economics: The World Trade Organization's Decision in the US-Mexico Arbitration on Telecommunications Services, *Federal Communications Law Journal*, vol. 57, 2004.
[18] 15 U.S.C. § 61-64.
[19] Panel Report, para. 7.177.

under the ITU also supports the view that it refers to the cost of supplying the service and that the widespread use of LRAIC among WTO Members supports this interpretation.

Having determined that the LRAIC is the appropriate benchmark for 'cost oriented', the Panel then compared the price for terminating international calls with the price for terminating calls within Mexico for the same network components[20] and found them not to be cost oriented because the international rates were substantially higher than the domestic termination rates.[21]

Although LRAIC is required by Mexican law in the settlement of interconnection rates, this is not the only meaning that the term 'cost oriented' may bear under its legislation. The law merely requires that domestic interconnection rates *at least* allow recovery of the long run average incremental cost.[22] Thus, the shared understanding of the term to which the Panel referred, by referring to the practice of WTO Members (specifically their domestic legislation) is not conclusively supported by reference to domestic legislation of WTO Members.

There is also little agreement as to what cost-oriented means in the context of the ITU when the LRAIC is to be used. On the one hand, the US's submission was to the effect that the term implies the cost of supply of the service based on a methodology to calculate cost that is predicated on all fixed costs becoming variable costs over the long run.[23] On the other hand, the Panel referred to the ITU's understanding of LRAIC as involving methods focusing on 'additional future fixed and variable costs that are attributable to the service'.[24] This difference in meaning would seem to suggest some discretion for WTO Members in setting appropriate cost oriented rates to account for some fixed costs, although the Panel rejected this application of the concept with respect to Mexico's defence.

[20] The relevant network components are international transmission and switching, local links, subscriber line, and long distance links.
[21] Approximately 77% higher. See Panel Report, para. 7.203.
[22] Panel Report, para. 7.176 (referring to Article 63 of Mexico's Federal Law on Telecommunications)
[23] Ibid. para. 4.173.
[24] Para. 7.175.

IMPLICATIONS OF THE DECISION

Has there been a successful merging? It is questionable whether the WTO succeeded in the merging of the two regimes that would provide adequate guidance for future panels. Its analysis on the competition issues was not as robust as is characteristic of domestic competition authorities. Its approach to finding the product and geographic markets did not delve into demand and supply substitution analyses, notwithstanding its reliance on domestic law to support its interpretation of what may be considered anti-competitive practices as understood by WTO Members.

It may be that the current structure of the WTO does not allow for this, i.e. panels are limited to their terms of reference and cannot engage in independent fact finding, as distinct from competition authorities in the domestic setting. This means that a claim that is not rebutted prevails once the applicable burden of proof has been met, whether or not there may be countervailing evidence to rebut the claim.

Bearing in mind that Mexico did not appeal the decision, it may be a source of guidance for how some domestic obligations are to be interpreted to avoid legal challenges in the multilateral arena. The term cost-oriented, for example, features in the legislation of countries that have assumed obligations under GATS with respect to telecommunications services. Section 30 of The Telecommunications Act of Jamaica for example provides for interconnection at cost oriented rates, and it may be that the Panel's approach may offer guidance on interpretation, albeit domestic jurisdictions are not bound by the ruling.

As the ruling stands, international settlement rates must be related to domestic settlement rates to determine if they are cost-oriented. It is not clear from the decision whether international settlement rates must equal domestic settlement rates. The Panel referred to the substantial variation between domestic and international settlement rates, but did not address the question of what would be a reasonable variation between the two rates, and if the international settlement rate would not be considered cost-oriented, however slight the margin of difference between the two rates. Here is a case in which the WTO found cartelization, but no predatory or below cost pricing, and a decision whose very basis may have been the alleged excessive pricing since it is hardly likely that there would have been a dispute if the international settlement rate (even if fixed by a cartel authorized by legislation) were equal to the domestic settlement rate.

Clarity on these questions would doubtless afford stronger grounding for merging market access and competition principles within the WTO. It remains to be seen whether the decision will be merely a footnote in this process.

ANTIGUA-GAMBLING: A COMMENT

In *Antigua-Gambling* the issue arose as to whether certain US federal and state laws restricting suppliers outside the US to remotely supply gambling and betting services to consumers in the US violated Articles VI,XI, XVI and XVII of GATS.

The Panel found that the measures violated Article XVI of GATS which forbids any of the market access restrictions listed unless otherwise specified in a Member's schedule and that these measures were not justified under the excepting provision of Article XIV (a) and (c) of GATS.

The AB agreed with the Panel that the measures violated Article XVI of GATS, but reversed the Panel's findings that the measures were not justified under the public morals exception under sub-paragraph (a) of Article XIV of GATS.

On the question of whether the ban on internet gambling fell within Article XVI of GATS as a quantitative restriction in the forms identified at XVI:1 (a) and (c), the AB clarified, in agreement with the Panel, that a prohibition on one, several, or all means of delivery under mode 1 is a limitation on the number of service suppliers in the form of numerical quotas in terms of Article XVI:2 (a) since it prevents the use of one, several or all means of delivery included in mode 1.

The AB noted that the term 'in the form of' in Article XVI:2 (a) and (c) does not indicate that the forms identified therein are exhaustive, and that a limitation amounting to zero is a quantitative restriction within the meaning of Article XVI of GATS.

One may question whether the AB sufficiently delineated the distinction between quantitative and qualitative measures for the purposes of Article XVI of GATS and the circumstances in which a measure could be deemed to be one or the other as to be caught by or be excluded under this provision.

Here, however, the soundness of the AB's ruling is not being addressed; rather, our concern may be, the effect of non-compliance with the ruling by the US for a small developing country.

In the final analysis, the US did not comply with the ruling of the AB, announcing instead that it was withdrawing from its commitment to provide offshore gambling.[25]

And, although the Award of the Arbitrator, under Article 21.3, gave the U.S. until April 2006 to conform its laws and regulations to its GATS obligations,[26] the U.S. took no action.[27]

Subsequent proceedings including the establishment of a non-compliance panel and a request for authorization to retaliate resulted in Antigua being permitted to suspend obligations under the TRIPS Agreement.

It remains to be seen whether this remedy is likely to be effective. Bearing in mind there is no provision for damages to be provided on a retroactive basis, that is, from the time of the breach of the WTO obligation, it is questionable whether the authorization to retaliate, even in respect of another agreement for which the breaching party has a particular interest, can provide effective compensation.

BRAZIL-RYREADED TYRES: A COMMENT

In *Brazil-Retreaded Tyres*, a number of measures were introduced by Brazil amounting to an import ban on retreaded tyres and a corresponding measure prohibiting the marketing, transportation, storage, or keeping in deposit or warehouses of imported retreaded tyres.

Brazil argued that the prohibition on the importation of retreaded tyres and state measures restricting the marketing of imported retreaded tyres were justified under Article XX(b) of the GATT 1994 as being necessary to prevent risks to human animal or plant life and health.

The risks identified included the view that the accumulation of waste tyres increases exposure to toxic emissions caused by tyre fires and that it facilitates the transmission of mosquito borne diseases such as dengue fever and malaria.

[25] Bruce Zagaris, *European Trade Association Brings Complaint Before EU over Selective U.S. Prosecution of Internet Gaming*, CYBERCRIME, Feb. 2008.
[26] DSU Article 22.6 Panel Report, para. 1.3
[27] DSU Article 21.5 Panel Report,para. 6.4

Brazil-Retreaded Tyres raised the issue of whether a decision from an arbitral tribunal within a regional organisation (MERCOSUR) imposing on a party an obligation to implement same which, as a measure implemented, has the effect of discriminating against non-parties is a measure which is rationally connected to the objective of the measure for the purposes of the excepting provision of Article XX of GATT.

The Panel held this not to be arbitrary or unjustifiable discrimination in the context of the Chapeau of Article XX of GATT, but the AB answered in the negative. So, where RTA obligations require a certain action which is facially, and in effect, non-discriminatory for parties to the FTA but results in discrimination for non-parties in its application, the measure so imposed to give effect to the RTA obligation may not be regarded as rationally connected to its objective, notwithstanding that it results from a judicial determination within the RTA.

As the AB clarified on this issue:

'...However, discrimination can result from a rational decision or behaviour, and still be "arbitrary or unjustifiable", because it is explained by a rationale that bears no relationship to the objective of a measure provisionally justified under one of the paragraphs of Article XX, or goes against that objective.'[28]

In arriving at this conclusion, the AB did not seek to determine whether MERCOSUR met the requirements of Article XXIV and whether that would have mattered for the purposes of whether Brazil's measure could meet the requirements of the Chapeau of Article XX of GATT. Put differently, might Article XXIV be used in the Chapeau analysis to permit a discriminatory measure to the extent that Article XXIV permits Members of an RTA to discriminate against non-parties?

Nor was there any consideration of whether an Article XXIV justification (which Brazil claimed for its measure) could be advanced to trump the Article XX defence, if it is unsuccessful, as it was found to be in this case. The AB, of course adopted this course on the basis that the conditions were not met for addressing the conditional appeal raised by the EC[29] for a consideration of the Article XXIV defence raised by Brazil and for the completion of the analysis in respect of the claims under Article I:I and XIII:I of GATT.

[28] *Brazil-Retreaded Tyres*, AB Report, para. 232.

[29] The condition being that the AB upholds the Panel's finding that the MERCOSUR exemption does not result in the Import Ban being applied inconsistently with the requirements of the chapeau of Article XX.

The Panel observed that the decision of the MERCOSUR arbitral tribunal was neither capricious nor arbitrary and that there was therefore no arbitrary or unjustifiable discrimination in the implementation of the measure for the purposes of the Chapeau.

For the AB, however, the question was whether not-withstanding the decision of the arbitral tribunal, accepting same not to be capricious or arbitrary,[30] the measure imposed in compliance with same was not rationally related to the measure in issue,[31] that is, the measure required the removal of the ban within MERCOSUR, whilst the ban was maintained for non-parties. For the AB such a discriminatory application of the measure could not serve, but rather frustrate, the measure's objective of protection of the environment.

This ruling brings into focus the question of whether Article XX is available as s defence if no account is taken of the reason for the discrimination in the application of a measure.

To be sure, the MERCOSUR arbitral ruling did not require discrimination in the application of the import ban, that is, there was no requirement that the import ban be applied discriminately to non-parties of MERCOSUR.

But, to the extent that Article XXIV of GATT permits discriminatory application of trade measures with regards to non-parties of an RTA the circumstances where this is permissible within a consideration of the multilateral framework is worthy of elaboration.

CONCLUDING REMARKS

WTO disputes involving Latin American and Caribbean countries have, in the main, not been concerned with the enforcement of competition law per se. However, given that competition issues underlie core

[30] The AB observed that:
' *Like the Panel, we believe that Brazil's decision to act in order to comply with the MERCOSUR ruling cannot be viewed as "capricious" or "random". Acts implementing a decision of a judicial or quasi-judicial body—such as the MERCOSUR arbitral tribunal—can hardly be characterized as a decision that is "capricious" or "random"...*' (para. 232. AB Report, *Brazil-Retreaded Tyres*)
[31] As the AB noted on this issue:

'Accordingly, we have difficulty understanding how discrimination might be viewed as complying with the chapeau of Article XX when the alleged rationale for discriminating does not relate to the pursuit of or would go against the objective that was provisionally found to justify a measure under a paragraph of Article XX.' (para.227 AB Report Brazil-Retreaded Tyres)

'*In our view, the ruling issued by the MERCOSUR arbitral tribunal is not an acceptable rationale for the discrimination, because it bears no relationship to the legitimate objective pursued by the Import Ban that falls within the purview of Article XX(b), and even goes against this objective, to however small a degree. Accordingly, we are of the view that the MERCOSUR exemption has resulted in the Import Ban being applied in a manner that constitutes arbitrary or unjustifiable discrimination.*' (para. 228, AB Report, *Brazil-Retreaded Tyres*).

WTO obligations disputes under GATT or any of the annexed WTO agreements often involve interpretation and application of core obligations included in those agreements.

The record to date suggests that complainants are more likely to prevail at dispute settlement than respondents given the nature and practice of the pleadings involved, and the fact that the doctrine of harmless error is not applied for the purposes of determining whether a measure should be withdrawn in the event of a breach of any of the provisions pleaded as being breached.

Some of the cases address systemic issues relating to the extent of regulatory autonomy envisaged and obtainable within the dispute settlement system particularly regarding the availability of Article XX or its equivalent in other agreements as a defence.

The three cases chosen, while not representing a common thread regarding the issues frequently encountered in dispute settlement involving Latin American and Caribbean countries, provide a benchmark for assessing the workings of the dispute settlement system regarding new and old issues involving underlying competition concerns.

In the main, much clarification and elaboration of the existing disciplines surrounding regulatory autonomy remain to be revisited, and the issue of whether an effective remedy exists for non-compliance of WTO obligations by larger trading parties *vis-a vis* smaller trading parties is still unresolved.