
A WTO Perspective on Private Anti-Competitive Behavior in World Markets

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I. INTRODUCTION

The advent of the global economy has raised many questions about the adequacy of national competition laws to deal with anti-competitive behavior by businesses operating in this larger transnational setting. The most prominent questions relate to the effectiveness of competition policy itself: Do national laws have enough jurisdictional reach to carry out their mission in cases involving anti-competitive conduct by global enterprises? Conversely, will the attempt to extend regulatory control over global enterprises cause harmful conflicts between national competition laws? If cooperation between national authorities is possible, what kind of cooperation should it be?

Another set of questions has been raised by agencies responsible for international trade policy — primarily the World Trade Organization (WTO), and the trade ministries of WTO member governments that direct its operations. While the WTO has a broad interest in all aspects of competition law that affect conditions of competition in world markets, the WTO has a particular interest in one kind of private anti-competitive behavior which I shall call “private trade barriers” — arrangements by domestic producers such as boycotts or refusals-to-deal that exclude imported products from their market. The question is whether the national competition laws of certain WTO member governments are adequate, or being enforced sufficiently, to deter this particular kind of private anti-competitive conduct. Although there is some disagreement as to the actual size of this problem at the present time, many leading governments in the WTO are convinced that a number of important markets have already been closed by such private anti-competitive behavior, and that the problem is likely to grow as industries in smaller countries catch

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on to the game.¹ The more that government-mandated trade barriers are lowered, the argument runs, the greater the incentive for private enterprises to create their own trade barriers. At some point, it is claimed, the spread of such private trade barriers will undermine the present trading system, by undermining the effectiveness, and thus the political acceptability, of the reciprocal trade agreements on which it is built.

The WTO has chosen to pursue both its broad interest in competition policy, as well as its specific interest in private trade barriers, by launching a "Working Group on the Interaction Between Trade and Competition Policy" (Working Group), with a mandate to study all aspects of the interaction between these two policy areas. The Working Group's first report, after two years of discussion, confirms the breadth of its mandate, mentioning what would seem to be all potential points of contact.² The report details different opinions on many issues, including a number of points of major policy conflict that could well preclude the achievement of any tangible results. These potentially contentious issues include the resistance of some national competition authorities to submitting to WTO legal controls, and the insistence by some developing countries that any WTO action on competition policy must be linked to liberalization of certain "anti-competitive" aspects of WTO policy such as anti-dumping laws. At this early stage, the WTO's future course of action in this area is still far from being determined.

Thus far, the Working Group has been the most visible initiative taken by the WTO to deal with private trade barriers, leading many observers to assume that the solution to this problem is to be found in the remedies provided by national competition laws. This is not surprising. The traditional dividing line between trade policy and competition policy has been the proposition that *government* barriers to trade are the business of trade policy authorities, while *private* barriers to competition are the business of the competition law authorities. Nor is such attention inappropriate. In the long run, anything the WTO can do to foster the development or improvement of national competition laws will not only advance its interest in open markets

¹ . At the present time, the principal complaints about private trade barriers are focused on Japan, where such complaints have been rather common for some years. The concern about the future is not only that such private trade barriers will become more prevalent in Japan, but also that smaller countries with no traditions of competition law, especially those in Asia, will emulate the Japanese example under the influence of investment from Japan.

² . See World Trade Organization, *Report (1998) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council, Dec. 8, 1998, WT/WGTCP/2*, (visited Sept. 27, 1999) <<http://www.wto.org/wto/online/ddf.htm>> [hereinafter *Report of the Working Group*].

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generally, but it will undoubtedly also make a contribution toward containing private trade barriers in particular.

Unfortunately, competition law remedies may not always be a satisfactory answer to the problem of private trade barriers. Competition law authorities in countries that are not enforcing their competition laws to the satisfaction of the trade policy community tend to be resistant to criticism, claiming that they are already acting on all the cases that deserve attention. In some cases this situation may reflect a somewhat different view of competition policy, one which places greater emphasis on making markets “orderly” as well as contestable. In others, there may be subtle differences in the priority given to anti-competitive practices affecting foreign producers. And finally, even with the best of enforcement intentions, the severe remedies called for by national competition laws tend to surround such laws with rigorous substantive and procedural requirements that make them difficult to use, particularly in an international setting.

It seems inevitable, therefore, that the WTO will be compelled to consider taking measures against private anti-competitive behavior that do not rely on national competition laws. In fact, it has already done so in one area. It is important, therefore, for all those who study the role of competition policy in the global economy to be aware that the WTO does have a distinctive policy perspective toward private trade barriers, and that this policy perspective provides the basis for distinctive legal remedies that the WTO itself can develop. The present paper is intended to set out a brief explanation of this WTO dimension to the overall problem. Part II tries to explain the WTO policy perspective on private trade barriers, with particular emphasis on those aspects that make it different from the competition law perspective.³ Part III describes the various legal remedies that the WTO itself may be able to employ in this area.⁴

The paper is written with an awareness that many of the WTO options described below may prove to be unattainable, and some might even be thought fanciful. But as long as the WTO, and other fora such as this symposium, keep discussing the role of competition law in the global economy, it will be worthwhile to keep reminding the participants that there are other perspectives, and possibly other remedies, that will affect the overall treatment of global competition problems.

II. THE TRADE POLICY PERSPECTIVE

What are the differences in the perspectives that competition policy and trade policy bring to the problem of private anti-competitive behavior in the global economy? Competition policy represents a viewpoint that is still largely national in character. The national dimension is important, because,

³ . See *infra* note 5 and accompanying text.

⁴ . See *infra* notes 6-32 and accompanying text.

apart from their common concern for efficiency, national competition laws invariably represent unique national attitudes about the social and political impact of the country's economic structure. This gives the political economy of competition laws a depth and complexity greater than the more task-oriented foundations of international trade policy.⁵

By contrast, trade policy is thoroughly international in outlook. Although it lists among its goals the openness of markets generally, its specific mission is to reduce barriers to international trade. This is a mission that requires, above all, cooperation between governments. For better or worse, the trade policy establishment has developed a particular way of doing business as a means of securing that cooperation. The present international "trading system" represented by the WTO is built upon trade agreements in which member governments exchange market access opportunities with each other. The incentive that makes the system work is the "reciprocity" it achieves — the gains for a country's own producers that offset the discomfort that increased foreign competition brings to other national producers. It is from this perspective that the trade policy establishment focuses on private anti-competitive behavior. The concern is that unregulated (or under-regulated) private anti-competitive behavior of this kind will undermine the reciprocity of these negotiated trade agreements, and thus undermine the basis of the entire international trading system.

Ultimately, the distinctive character of the trade policy concerns lies in the nature of the political forces that trade policy institutions represent. Notwithstanding the almost uniform opinion of economists that trade liberalization benefits the national economy, most governments face a difficult political struggle to secure legislative support for such a policy. The key to political support is the support of the nation's exporters. By structuring trade liberalization as an exchange in which a nation's own trade liberalization is exchanged for trade liberalization by others, the government is promising exporters access to foreign markets if, and only if, they can help to persuade their own legislatures and parliaments to pay for that market access by granting liberalization of the country's own markets. In order to hold this political support from exporters, of course, the government must deliver on the promise of foreign market access. Private trade barriers that block access to those foreign markets prevent a government from being able to keep that promise.

It is sometimes said that competition law is focused on the economic (as well as social and political) welfare of national consumers, whereas international trade law is focused on the welfare of national exporters. On

⁵ . See generally THE POLITICAL ECONOMY OF THE SHERMAN ACT: THE FIRST ONE HUNDRED YEARS (E. Thomas Sullivan ed., 1991) (a relatively concise presentation of the many stands that can be found in United States competition law).

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occasion, the statement is expressed as an accusation, suggesting that the general welfare goals of trade policy have been *captured* by self-seeking export industries. This makes a good story, but unfortunately it rests on a rather naive view of trade policy. In most of the key WTO governments, only exporters interested in foreign market access are capable of providing the amount of political support that is needed to pursue a liberal trade policy. Without the exporters, there would be no trade policy to capture.

Viewed from the trade policy perspective, therefore, the “wrong” of private trade barriers is that they deprive the other countries that are parties to a trade agreement to a part of the quid pro quo for which they have bargained. Such barriers deny the market access that governments as well as their exporters were promised in exchange for opening their own markets. Rather than a norm that rests on the actual impact the private behavior has upon the competitiveness of the relevant market, or upon consumers, this is a norm that rests on the particular “deal” that was made promising market access.

Another distinctive element of the trade policy perspective on private trade barriers is the importance of the consequences involved. To the extent such private barriers are, or become, significant, those impediments to market access could cause a significant lowering in the level of political support for trade liberalization in general. A significant lowering of political support, in turn, could not only impede future trade liberalization but could well undermine much of the trade liberalization that has been achieved to date. If the problem proves to be as widespread as some think it is, the WTO will not be able to tolerate a no-action answer.

III. THE TRADE POLICY RESPONSE

The primary purpose of this section is to discuss the responses that the WTO may be able to develop to the problem of private trade barriers — WTO remedies that do not depend on competition law authorities, but instead depend on the WTO legal system and its way of dealing with the type of “wrong” defined by the WTO perspective on this problem. Before doing that, however, it will be useful to obtain a better view of the other option — what the WTO can do to invigorate national competition law authorities to employ their legal resources to inhibit private trade barriers. The WTO will certainly undertake efforts to enlist the aid of competition law, as it should. The need for, and value of, the WTO’s own remedies can only be understood in relation to the likely results of the WTO’s competition law initiatives.

A. Inducing Greater Action by Competition Law Authorities

Notwithstanding the fact that competition law authorities are likely to have somewhat different concerns about private trade barriers, simple common sense would dictate that the first response of trade policy authorities to this problem should be an effort to stimulate national governments to use their competition laws more forcefully. Competition laws represent an existing legal arsenal, equipped with the weapons needed to strike down the collusive private behavior that produces private trade barriers. The purpose of those

laws, while not entirely congruent with trade policy objectives, is in general aimed at preventing such anti-competitive conduct.

The fact that trade policy officials view private trade barriers as a current problem indicates a perception that, on the whole, competition laws in many countries are not presently addressing such private conduct in a sufficiently effective manner. There are several reasons for inaction. In some less developed countries, there may be no competition law at all, or, if there is, it may be a more limited version that does not reach all such behavior. In countries where the law does reach such behavior, the reason may be lack of a sufficiently high priority for investigating or prosecuting such conduct — a natural inclination where resources are limited and administrators must therefore be selective in the cases they choose to prosecute.⁶ Another important reason for inaction could be the difficulty of proving that such anti-competitive conduct is actually taking place — a problem which tends to be magnified by the rigorous legal standards employed in this area, and the rather elaborate judicial procedures that are employed to safeguard the rights of private defendants.

The common solution to all these problems would seem to be greater effort by competition law authorities. For countries without adequate competition laws, it means greater efforts to obtain adequate laws. For countries where the necessary laws are already in place, it means greater effort in investigating, and greater effort in prosecuting. The tools to induce that greater effort range from education and persuasion as to the value of adequate competition laws, at one end of the scale, to a negotiating process leading to formal legal commitments by governments, at the other end.

1. The Working Group

The WTO has already initiated an effort to educate competition law authorities about its concerns and interests. It has appointed a “working

⁶ . The competition law authorities of the exporter's home country have less incentive to try to prosecute such private trade barriers, both because of the jurisdictional problems of trying to deal with behavior in another country, and also because such conduct does not adversely affect domestic consumers. The latter consideration actually dictated a no-action policy of the U.S. Department of Justice from 1988 to 1992. See *Department of Justice Policy Regarding Anticompetitive Conduct That Restricts U.S. Exports*, reprinted in 4 Trade Reg. Rep. (CCH) ¶ 13,108 at 20,589-19 (Apr. 11, 1995). Although the no-action policy has been repealed, the factors that induced it undoubtedly still influence the allocation of scarce enforcement resources. While competition law authorities of the importing country can be expected to be concerned about the impact of such private trade barriers upon competition in their domestic markets, protectionist influences exist in all countries, and where many violations are competing for attention in a world of scarce resources, it would be naive to think that such pressures will not have an influence on priorities.

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group” to study the interface of trade policy and competition policy, called the “Working Group on the Interaction Between Trade and Competition Policies.”⁷ The WTO Working Group is charged to identify and examine all areas in which trade and competition policies can be said to interact. The structure of the Working Group brings officials from competition law authorities into contact with the WTO officials and government representatives. Although the agenda of the Working Group is much broader than the specific problem of private trade restraints, the improved understanding generated by these many other agenda items can be expected to contribute, at least in the long term, to the better regulation of private trade restraints in particular.

Beyond the Working Group, the WTO could try to serve a variety of roles, large and small, that would ensure some WTO participation in further cooperative activities by national competition law authorities. For example, some of the participants in a recent symposium on trade-and-competition policies offered a relatively modest proposal suggesting the creation of a small “unit” housed within the WTO, but autonomous from it, that would provide a forum for national competition authorities: (1) to examine problems of divergence between national laws and policies, (2) to examine the global effects of anti-competitive practices, (3) to advise developing countries who wish to enact new or improved competition laws, and (4) in due course to initiate negotiations on further convergence or harmonization of national laws and/or procedures.⁸ Even if such a unit made no direct contribution to eliminating private trade barriers, the WTO presence would, at a minimum, further sensitize national officials to trade policy concerns in this area.

Agreements that focus on consultation rather than legal obligations come in all sizes. In WTO parlance, they are usually referred to as “framework agreements.” Even if there is no political desire to negotiate standards at this time, some kind of framework agreement is quite likely.

2. A TRIPS-type Agreement on Competition Policy?

The ultimate “vision” for WTO action with regard to national competition laws would be the negotiation of a major agreement between WTO governments, or perhaps just forty or so most important ones, setting minimum standards for national competition laws.⁹ The most common response to this proposal so far has been the view that “the time is not right” for such an agreement. Repeated often enough, this response will very likely be enough to kill the idea. Notwithstanding the rather dim prospects for

⁷ . See *Report of the Working Group*, *supra* note 2.

⁸ . See A. Jacquemin, et al, *Competition Policy in an International Setting: The Way Ahead*, in 21 *THE WORLD ECON.* 1179-83 (Blackwell Publishers, Ltd. 1998).

⁹ . The word “vision” has two meanings, each of which is sometimes applied to this idea — one, a term of approval for ideas representing especially acute foresight, the other, a synonym for the word “hallucination.” Both uses of the term were in evidence at this symposium.

action, a brief discussion of the pros and cons of this idea will provide a useful background for subsequent consideration of the other WTO options for dealing with this problem.

The idea of negotiating an agreement setting minimum standards for national competition laws is based on a relatively new concept in the legal system developed by the General Agreement on Tariffs and Trade (GATT)¹⁰ and taken over by the WTO legal system. Traditionally, GATT legal obligations were limited to rules telling governments what they should not do — rules prohibiting certain border restrictions, rules limiting the level of tariffs, and rules prohibiting internal taxes and regulations that treat imports less favorably than domestic products. This negative type of international obligation is the easiest to negotiate, and the easiest to police and enforce. Then, in the Uruguay Round, governments agreed to the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS),¹¹ in which, for the first time, the GATT produced affirmative obligations telling governments what they must do — specifically, what intellectual property laws they must have and what domestic enforcement structures they must have. TRIPS also provides a WTO adjudication procedure, backed by trade sanctions, to enforce such commitments. The successful negotiation of the TRIPS agreement inspired many observers to consider whether the WTO could also negotiate other agreements on the TRIPS model.

A TRIPS-type agreement on competition law would start by setting out the minimum elements of a national competition law — the kinds of conduct to be prohibited, and the domestic enforcement procedures for carrying out that prohibition. The agreement would then provide for adjudicating claims of non-compliance with these minimum standards through the WTO dispute settlement process, backed by trade retaliation in the case of noncompliance. Brian Hindley has offered a somewhat whimsical title for such an agreement that would allow it to take its place along the TRIPS and TRIMS agreements. Just as “TRIPS” stands for Agreement on Trade Related Intellectual Property Rights, and as “TRIMS” stands for Agreement on Trade Related Investment Measures,¹² so we could have “TRACLAP” for Agreement on Trade Related Aspects of Competition Law and Policy.¹³

¹⁰ . General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

¹¹ . See agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 33 I.L.M. 81(1994) [hereinafter TRIPS Agreement].

¹² . Agreement on Trade-Related Investment Measures, Apr. 15, 1994, 33 I.L.M. 1125, 1179-80 (1994) [hereinafter TRIMS Agreement].

¹³ . See Brian Hindley, *Competition Law and the WTO: Alternative Structures for Agreement*, in 2 FAIR TRADE AND HARMONIZATION: PREREQUISITES FOR FREE TRADE? 333 (Jagdish Bhagwati & Robert Hudec eds. 1996). Hindley's essay is an exceptionally thorough analysis of the

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The TRIPS agreement itself was greeted with a certain amount of skepticism as to its likely effectiveness. The first objection was that the WTO did not have the capacity to enforce such an agreement. The substance of national intellectual property law, it was argued, is ultimately determined by the way the general concepts of intellectual property law are applied in specific cases. WTO dispute settlement panels, critics said, would not have the time, the expertise, or the fact-finding capacity to adjudicate the correctness of national decisions on specific intellectual property claims. In response, the TRIPS proponents argued that the WTO would not have to adjudicate individual cases. Rather, it was argued that a great deal could be accomplished simply by policing the structural details of national intellectual property law, and that this is where WTO enforcement pressures would be concentrated. Although this latter position prevailed, it remained controversial to the end, and only the experience of a decade or so will show whether this “structural” sort of regulation will in fact prove to be effective.

The same objection can be made to a TRIPS-type agreement on national competition laws. In this case, the objection is likely to be more telling. Just as WTO dispute settlement panels do not have the capacity to adjudicate specific applications of intellectual property law, WTO panels do not have the capacity to try (or re-try) specific competition law cases under national competition laws. WTO panels do not have the legal tools to conduct the massive fact-finding expeditions that occur in such cases, especially if the private enterprise in question is allowed to conduct its defense, and if confidential business information is involved. The TRIPS answer to such an objection, the idea that results can be accomplished merely by focusing on the structural elements of national law — seems less persuasive in the competition law context. When experts in competition law look at the one country where accusations of private anti-competitive behavior are most frequently made, Japan, they report that the structure of Japanese competition is difficult to distinguish from U.S. or EU competition law, leaving very little to ask for in the way of structural improvements. They also point to a decades-long, and largely unsuccessful, effort by the United States to invigorate Japanese administration of competition law by threats of trade retaliation — in many ways a functional equivalent of the pressures that would be generated by a TRIPS-type agreement — as proof that the pressures generated by such an agreement would not be very effective.¹⁴

possible forms that a WTO agreement on competition policy might take, including the various ways in which the concept of “Nonviolation Nullification and Impairment” (NVN&I) might be used. Although written in 1994, subsequent events have shown its observations and judgments to be exceptionally perceptive. As the whimsical nature of his TRACLAP title indicates, Hindley expresses considerable skepticism about both the attainability and the potential value of such an agreement. *See id.* at 343-47.

¹⁴ . I am indebted to Judge Diane P. Wood for calling my attention to these criticisms, in the discussion following the oral presentation of this paper.

A TRIPS-type agreement on competition policy usually encounters a further list of objections from the competition policy viewpoint, particularly from U.S. competition law authorities. Their main point is that an effort to negotiate such an agreement would be a waste of time. A negotiation of this kind, they argue, would probably not be able to reach any consensus on substantive norms in the first place, and even if it did it would probably not do very much to improve the administration of national competition laws. Not very far behind these objections is the general aversion of competition law authorities to sharing power with the trade ministries who operate the WTO, an aversion born partly out of disdain for the kinds of protectionist policies sometimes followed by trade ministries for example, anti-dumping laws and no doubt partly out of simple bureaucratic turf protection. Coupled with the previously mentioned objections to the effectiveness of such an agreement, the opposition of certain competition law authorities makes the negotiation of any such agreement a rather remote possibility at present.

In sum, the WTO will have every reason to keep trying to interest national competition law authorities in more vigorous prosecution of private trade barriers. In all likelihood, it will find some ways of cooperating on issues of common concern, and this will probably generate somewhat greater sensitivity to the trade policy concerns about private trade barriers. In all likelihood, the WTO will not achieve anything like a TRIPS-type agreement on competition law, and, even if it did, one would have to reserve judgment about its likely efficacy. The most likely outcome, therefore, would be a fairly modest increase in the attention given to private trade barriers by national competition authorities.

At the end of the day, the questionable value of a TRIPS-type agreement and the more modest impact of framework-type agreements make it likely that national competition laws will not provide the degree of corrective action the WTO desires. In that event, the WTO will have to be prepared to examine its options for taking action by itself, independent of national competition authorities. It is to this type of response we now turn.

Reference to the experience of the United States with Japan in this matter calls attention to a possible distinction in the factors that will affect the success or failure of "structural" agreements; namely, the relative power of the country or countries who are likely to be the targets of such rules. For the most part, the TRIPS agreement was aimed at developing countries. Even if the WTO cannot adjudicate claims of compliance in specific cases, the more general obligations of the TRIPS agreement will nonetheless confer a certain legitimacy upon more vigorous bilateral representations, including threats of retaliation by the large countries who are the main providers of intellectual property. Even with increased legitimacy, however, such bilateral threats tend to diminish in effectiveness the larger the size and economic strength of the target country.

B. Action by the WTO Alone

In order to create a WTO remedy for private trade restraints against imports, one must be able to characterize the existence of private trade restraints as a violation of GATT legal obligations, or as a lesser kind of wrong called “Nonviolation Nullification and Impairment” (NVN&I).

The WTO has a distinctive approach to legal obligations. The central “wrong” that triggers legal remedies in the WTO legal system is a concept known as “nullification and impairment,” which refers to a failure by a government to receive some part of the market access it was promised as a quid pro quo for the market access that it has granted to other governments.¹⁵ The clearest situation of nullification and impairment is the case where a government fails to carry out a legally binding promise not to engage in trade-restricting conduct of some kind. Once a breach of legal obligation is found, the defendant government is under a legal obligation to remove the offending measure. Removing the offending measure, of course, will restore the expected quid pro quo, and the deal will be in balance. If the defendant government does not (or cannot) remove the offending measure, then the defendant government must either grant new trade concessions in compensation — a substitute quid pro quo that will restore the balance of the original deal — *or* must suffer a proportionate increase of trade barriers by the other government or governments injured by the measure — a “money-back” type of remedy that also restores the balance of the deal, in a downward direction. Although re-balancing through compensation or retaliation is not regarded as a final solution because the legal obligation to remove the measure takes precedence, all three remedies are based on the underlying notion that the balance of the deal must be preserved.

Nonviolation nullification and impairment is a less binding form of remedy along the same lines. Under the NVN&I concept, a measure not in violation of any promise, and thus not a legal violation, can nevertheless be found to be “impairing” the market-access benefits that a country could reasonably have anticipated from the promises made in a trade agreement. The most common example of government action constituting NVN&I would be the grant of a new production subsidy to domestic producers after granting a trade agreement tariff concession on the same product. Though not a violation of GATT obligations, the production subsidy that gives those domestic producers an artificial advantage over foreign producers that replaces the artificial advantage that their government has just committed itself to eliminate in the trade agreement concession reducing the tariff on that

¹⁵ . GATT/WTO law is clear that the “benefits” governments bargain for are the market opportunity that comes from removal of competitive disadvantages, not actual increases in trade flows. The term “market access” is used here in that sense. The term also covers removal of distortions such as subsidies that would create competitive disadvantages for other, non-subsidized trade.

product.¹⁶ While the subsidizing government is not legally obligated to remove the benefit-impairing subsidy, the government injured by this unanticipated measure is still entitled to re-balance the deal — either by receiving equivalent trade concessions from the offending country, or by taking its money back in the form of trade retaliation. If a softer form of WTO regulation were thought necessary or desirable in dealing with private trade barriers, the WTO could deal with the problem by characterizing such measures as this lesser kind of legal wrong.

There are two basic ways that the WTO could develop legal obligations or NVN&I remedies for private trade barriers. The first way is simply by making them a term of a newly negotiated WTO agreement, perhaps in one of the new agreements that are to be negotiated in the Millennium Round. Such new agreements would, of course, require the agreement of the parties to the negotiation, and their provisions about anti-competitive behavior would apply only to the subject matter of the new agreement, unless the agreement were cast as an amendment to earlier agreements. The second way to invoke GATT legal remedies would be to find that private trade barriers, or some of them, are violations of existing legal obligations, *or* that they constitute NVN&I of existing agreements. This would require legal interpretations by the WTO Appellate Body or a formal interpretation by the WTO General Council. The remainder of this paper examines these two ways of developing WTO remedies for the problem: (1) the negotiation of new agreements, and (2) the interpretation of existing agreements.

1. Creating New Obligations: The 1997 WTO Agreement on Basic Telecommunications

On February 15, 1997, sixty-nine member countries of the WTO concluded an agreement liberalizing trade in basic telecommunications services. The agreement, known as the Fourth Protocol to the General Agreement on Trade in Services,¹⁷ set out to liberalize access to the central telecommunications

¹⁶ . For a decision of the GATT Contracting Parties to this effect, see Reports Relating to the Review of the Agreement: Other Barriers to Trade, Mar. 3, 1955, GATT, B.I.S.D. (3d. Supp.) at 225 (1955). For two GATT decisions that clearly apply the doctrine see Australian Subsidy on Ammonium Sulphate, Apr. 3, 1950, GATT B.I.S.D. (vol. II) at 188 (1952) (working party report adopted 31 March 1950) [hereinafter Australian Subsidy case]; European Economic Community follow up on the Panel Report: Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins, GATT B.I.S.D. (39th Supp.) at 91 (1993) (panel report adopted 31 March 1992).

¹⁷ . For the text of the agreement and the individual country schedules see World Trade Organization, Agreement on Telecommunications Services (Fourth Protocol to General Agreement on Trade in Services), Feb. 15, 1997, 36 I.L.M. 354 (1997).

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networks by which information is transmitted in each country. Because telecommunications networks had traditionally been state or state-chartered monopolies, and because many of today's markets for basic telecommunications are still characterized by a certain residue of that monopoly power in the hands of the private firms, or groups of firms, the Telecom negotiators recognized that access commitments by governments in this area would not be meaningful unless foreign competitors in these markets were protected from the abuse of the dominant market power wielded by such private firms. Accordingly, an Annex to the Fourth Protocol known as the "Reference Paper" contained commitments by governments to prevent such "anti-competitive" practices.¹⁸

The text of the Reference Paper begins by defining a "major supplier" as "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) the use of its position in the market."¹⁹ With regard to such "major suppliers," the text goes on to provide:

1. Competitive Safeguards

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.

1.2 Safeguards

The anti-competitive practices referred to above shall include, in particular:

- (a) engaging in anti-competitive cross-subsidization;
- (b) using information obtained from competitors with anti-competitive results; and
- (c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide service.²⁰

Although the language of this obligation bristles with terms that would appear to invoke national competition law, it must be understood that this obligation is a free-standing WTO obligation, written without any formal connection to national competition law. Although the terminology of new obligations will obviously call for examination of similar concepts in the competition laws of various member governments, the agreement is to be administered by the WTO itself. The words will mean what the WTO says they mean, determined

¹⁸ . See World Trade Organization, *Report on the Group on Basic Telecommunications*, S/GBT/4 (Feb. 15, 1997), reprinted in 36 I.L.M. 367(1997) [hereinafter *Reference Paper*].

¹⁹ . *Reference Paper*, *supra* note 18, at 367.

²⁰ . *Id.*

according to whatever evidence of meaning or intention the WTO chooses to employ.

In order to legislate its own rules for certain kinds of private anti-competitive conduct, the WTO will have to develop some competition-type substantive standards to define the kinds of private behavior it wants to prohibit. This will be a challenging assignment. Unlike ordinary WTO rules of conduct addressed to government behavior, which in general simply require that government measures treat foreign goods no less favorably than domestic products, rules of conduct for private enterprises must distinguish between *legitimate* competitive activity designed to place foreign competitors at a market disadvantage and *illegitimate* competitive activity with the same objective. If the WTO is to define its own dividing line, it will have to fashion rules that are congruent with the community's sense of right and wrong competitive behavior (standards sometimes referred to as "core concepts" of competition law), and also congruent with the values and objectives of the particular industry — here the telecommunications industry and the national regulators who regulate it. In addition, the WTO rules must be of a kind that WTO dispute settlement panels, with their relatively more primitive procedures, limited fact-finding ability and accelerated time schedule, will be able to adjudicate effectively.

The Reference Paper clearly makes some effort to meet these objectives by being specific about the kind of private conduct to be prohibited. One provision, paragraph 1.2(c) on technical information, appears to define specific conduct that is prohibited as such. Paragraph 1.2 also identifies two other specific kinds of conduct, cross-subsidization and misuse of information, that are subject to prohibition, but in both these cases the prohibition is limited to acts that are "anti-competitive," in effect calling for an additional judgment about the *legitimacy* or *illegitimacy* of these later two kinds of conduct specified. The word "anti-competitive," of course, merely states the issue, with nothing more than a general indication that the standards to be applied should be drawn from concepts of competition law. The same "anti-competitive" criterion is used to define the very broad obligation stated in paragraph 1.1, that applies to all other kinds of activity by "major suppliers."

One pair of commentators has suggested that the Reference Paper's obligations on "anti-competitive" private behavior are unlikely to be implemented effectively without first developing some kind of WTO agreement about competition law standards themselves — an agreement that could be referred to when interpreting the word "anti-competitive."²¹ This

²¹ . Marco C.E.J. Bronkers & Pierre Larouche, *Telecommunications Services and the World Trade Organization*, WORLD TRADE, June 1997, at 26-28. This article contains an excellent analysis of the entire Fourth Protocol.

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author is inclined to believe that, even without such an agreement, WTO panels will be able to produce workable decisions that command respect, even if they are somewhat arbitrary at the beginning. There does seem to be a fair amount of consensus about so-called “core concepts” of competition law around the world, and private practices in conflict with these concepts should be relatively easy to classify. Cases involving finer issues on which national competition laws differ might be thought to pose a greater problem. Once again, however, it must be remembered that the Reference Paper Agreement is in no way trying to harmonize national competition law on these points. The WTO is free to answer these borderline issues in whatever way suits the objectives of the Reference Paper. Whatever the answers are, they will only be answers for this one area of government-to-government legal relations, affecting only the private firms involved in that sector of the economy. There would seem to be no good reason why the answers given by dispute settlement panels would be any less acceptable than in any other area of WTO law. There is no threat here to the integrity, and sovereignty, of national competition laws. Just a slight dent, perhaps, in their pretensions as exclusive arbiter.

As for the capacity of the WTO to adjudicate compliance with such obligations, the issue will be whether the WTO can avoid the terrors of having to litigate a classic U.S. antitrust lawsuit. Much will depend on how much the procedures and evidentiary requirements can be simplified to fit WTO practice. As just noted, the Reference Paper is a government-to-government agreement that leads to government-to-government remedies of trade retaliation and other forms of intergovernmental pressure. And once again, rulings under this agreement will have no direct legal consequences for the private enterprises whose behavior is the focus of attention. Traditionally, WTO governments have been willing to adjudicate legal claims against each other under the rather quick and simple procedures traditionally employed by the GATT and inherited by the WTO. GATT/WTO procedures provide for a six to nine month procedure in which: (1) parties file two sets of briefs and a few binders full of documents and written evidence; (2) they argue the issues in two adversary hearings; and (3) they answer one or two sets of questions posed by the panel.

One thing that helps to make the relatively primitive WTO adjudication process work is the fact that the evidentiary issues are about government conduct, which means that they usually involve matters of record. The facts themselves, after a little interrogation, usually end up being stipulated. The recent *Kodak-Fuji* dispute,²² which took a great deal more time and effort than the typical WTO dispute settlement proceeding, is sometimes held out as a model of what is likely to happen if the WTO has to adjudicate private anti-

²² . See World Trade Organization, *Japan — Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (visited Oct. 12, 1999) <<http://www.wto.org/wto/ddf/ep/public.html>> [hereinafter *Kodak-Fuji*].

competitive behavior. Actually, *Kodak-Fuji* was probably a bit easier than what WTO panels are likely to encounter in disputes over private behavior. *Kodak-Fuji* was about the behavior of the Japanese government. It took an exceptional amount of time to adjudicate because the complainant's case involved piecing together a large number of seemingly innocuous government actions which, while acknowledged, were subject to vigorous dispute as to their purpose and effects. In the end, the panel did resolve the issues to the satisfaction of most observers, and the resource cost, while greater than normal, did not even come close to the average cost of the scorched earth legal warfare that U.S. courts must deal with in major antitrust cases. The government-to-government setting of the WTO dispute settlement procedure should make it possible to avoid some of the excesses. Cases involving issues of fact regarding the behavior of private parties will be harder to adjudicate. Only experience will tell how much the WTO legal setting can reduce the complexity of such adjudication, and how well the WTO's simpler procedures will be able to cope with the ultimate package of issues presented by such cases.

A final point is worth making with regard to the nature of the Reference Paper obligations. The text states a government's obligation with regard to anti-competitive behavior of "major suppliers" in a rather limiting way. Governments are not required to "prevent" the enumerated types of anti-competitive conduct. They are merely required to "[maintain] appropriate measures . . . for the purpose of preventing [such conduct]."²³ It would appear that a government merely has to have a law prohibiting such measures, an agency with authority to act against such measures, a procedure for complaining to the authority, a staff with sufficient resources to investigate and prosecute, and a showing of administering the law in good faith. As with other TRIPS-type agreements, questions can be raised about the efficacy of such "structural" obligations. On the one hand, one can imagine such structural obligations producing the same kind of impasse as is currently said to exist with regard to certain national competition laws — an impasse in which the laws themselves seem to have all the right elements but never seem to be able to produce effective sanctions against wrongful behavior. On the other hand, such structural commitments could have greater efficacy in the case of a regulated industry like telecommunications, where directives issued by a regulatory agency could be easier to impose and dispose of greater enforcement powers.

Whatever the outcome with regard to the telecommunications industry, the potential difficulty in enforcing structural commitments should be recognized if the WTO decides to try to negotiate competition rules for other sectors. To obtain more specific commitments, however, negotiators will probably have to consider softening the legal consequences of such undertakings. This could

²³ . . . *Reference Paper*, *supra* note 18, at 367.

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be done by formulating the legal remedy in terms of NVN&I. Such an agreement would specify that the existence of the private trade barrier itself constitutes NVN&I. The anti-competitive conduct which constitutes the private trade barrier would still have to be defined, and would have to be established by the complainant. But the rule would provide that the existence of the private trade barrier is deemed to constitute a situation of imbalance, calling for compensation or retaliation, whether or not the defendant government can do anything about the barrier. If the government can correct the private trade barrier, so much the better. But if not, the complaining government would at least have the “balancing” remedies which recognize that a part of the promised quid pro quo has not been delivered, and that imposing at least this consequence may remedy the failure. Paradoxically, such a weaker remedy would also provide a greater incentive to try to eliminate the offending private behavior than would a more rigorous legal obligation to maintain a certain legal structure.

Although NVN&I is a concept that is usually employed in adjudication, the WTO would have the power to adopt NVN&I-type legal consequences for any of the rules it creates through negotiation. Arguably such an NVN&I rule was adopted in the 1979 Subsidies Code, adopted in the Tokyo Round.²⁴ The Code contained a new quasi-obligation stating that members “shall seek to avoid causing”²⁵ certain adverse effects when employing domestic subsidies. It then provided for dispute settlement proceedings to adjudicate complaints about such adverse effects, after which the Code Committee was permitted to authorize “such countermeasures as may be appropriate.”²⁶

2. Finding a Breach of Legal Obligations or NVN&I Under Existing WTO Agreements

a. Government Responsibility

If a government were to issue a legally binding regulation requiring the firms in an industry not to deal with imported goods, there would be no question that the regulation would be in violation of GATT obligations — either the prohibition against non-tariff border restrictions in GATT article XI:1 or the article III:4 prohibition against internal regulations that treat imports less favorably than domestic products. To put it another way, the

²⁴ . See Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, GATT B.I.S.D. (26th Supp.) at 56-83 (1980) [hereinafter Subsidies Code].

Subsidies Code, *supra* note 24,²⁵ at 70.

²⁶ . *Id.* at 72. For an analysis of this rather convoluted text, see Robert E. Hudec, *Regulation of Domestic Subsidies Under the MTN Subsidies Code*, in *INTERFACE THREE: LEGAL TREATMENT OF DOMESTIC SUBSIDIES* (Don Wallace et. al. eds., 1984).

trade restraints created by private anti-competitive behavior would all be GATT violations, and *a fortiori* NVN&I, if they were ordered by governments.

To be sure, “private” trade barriers are treated as a separate problem just because they are perceived *not* to be government measures. The key conclusion that immunizes such measures from GATT sanction is the conclusion that the government is not responsible for what the private enterprises are doing.

There is a grey area, however. In many cases, governments do play a meaningful role in encouraging and/or helping to organize anti-competitive conduct by private enterprises. A well-respected GATT panel decision in 1988 ruled that a government can be held responsible for ostensibly private conduct if that government has exerted a meaningful degree of influence in bringing about its occurrence.²⁷ The case involved the country of Japan that had used “administrative guidance” and a series of other surveillance measures to induce domestic producers of semiconductors not to export the semiconductors at dumping prices. A binding government regulation to this effect would have been an export restriction in violation of GATT article XI:1. Although none of the measures taken by the Japanese government are legally binding, the panel ruled that non-binding measures could render the government responsible for private actions if the government measures were decisively influential in causing the private conduct. The panel announced two criteria: (1) there must be reasonable grounds to believe that, in the circumstances, the government measures created sufficient incentives to persuade private parties to conform their conduct to the non-mandatory measures, and (2) that the effectiveness of the private conduct was “essentially dependent” on the non-mandatory actions taken by the government. Thus, where active government collusion is suspected, GATT remedies may be available if the government involvement meets the two criteria.

The WTO’s recent *Kodak-Fuji* case involved such an effort by the United States.²⁸ The case involved an ostensibly privately-organized distribution system that was closed to imported film and photographic paper. Contrary to the usual description of the case, the United States complaint did not try to persuade the WTO of the novel proposition that a government’s mere tolerance of such private anti-competitive conduct was a violation of GATT obligations or a case of NVN&I. Rather, the U.S. government tried to establish that the government of Japan’s role in promoting the creation of this closed distribution network was meaningful enough to require that the government of Japan be held responsible. The novel element in the case was the effort to prove

²⁷ . See *Japan — Trade in Semiconductors*, May 4, 1988, GATT B.I.S.D. (35th Supp.) at 155 (1989) (decision adopted May 4, 1988).

²⁸ . See *Kodak-Fuji*, *supra* note 22.

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government responsibility on the basis of a quite sophisticated analysis of the various pieces of Japan's conduct. The complaint failed because the provable facts were not strong enough to support it. As far as it went, the panel report found no flaws in the legal theory of the complaint.

The main point is that GATT does not need any new substantive rules to deal with those cases in which it can be shown that governments have contributed significantly to the creation and perpetuation of the private anti-competitive behavior in question. The hard legal work that needs to be done in this area is to refine, and if possible to improve the criteria that defines when governments ought to be held responsible. In addition, to be sure, efforts to disguise such government conduct can impose a very difficult evidentiary burden in proving the government's participation.

b. Government Inaction

The gravamen of most complaints about private anti-competitive behavior is not that governments have aided in the creation of such private restraints, but that the governments simply have failed to use their legal powers to stop them. The typical complaint of this kind has a strong element of "nullification and impairment" about it. Complaining governments begin with the position that they have opened their markets as required by their trade agreement promises. They then assert that foreign competitors have been able to take advantage of that opening because, *inter alia*, the complaining governments have enforced their competition laws to preclude private trade barriers. The complaining governments conclude by stating that they expected the same protected market access in return from their trading partners, especially from those trading partners who had state-of-the-art competition laws and who represented that their policy was to enforce them. While it might be hard to pin down explicit promises that would amount to explicit legal obligations to this effect, it could be argued that the existence of a competition law and an announced policy of enforcing the law was sufficient government behavior to create a "reasonable expectation" of protection that would sustain a claim of NVN&I.²⁹

On the other hand, the fact that many of these private trade barriers have existed for many years makes it possible to argue that governments either knew, or should have known, about them at the time the trade agreement in question was negotiated. The argument is particularly telling when the complaining government has actually complained about the private barrier at any time before the negotiations. The doctrine of NVN&I has always insisted rather strictly on the proposition that barriers cannot be considered a breach

²⁹ . See the Australian Subsidy case, *supra* note 16, where the finding of reasonable expectations rested upon this kind of argument. The finding rested on the conclusion that the conduct of the Australian government in maintaining parallel consumption subsidies on two competitive fertilizers had justified the complaining government's expectation that the subsidies for these products would be maintained or eliminated altogether.

of expectations unless they were in fact not known at the time the bargain was actually made, on the theory that known hazards are always discounted in the prices paid in a deal.

Thus, even before confronting the question of whether mere government inaction can be the basis for a claim of NVN&I, such a claim would first have to surmount the threshold issue of foreknowledge. Under present WTO law, that issue would likely turn on two questions: (1) the knowledge that the defendant can establish, and (2) the government conduct that the complainant can establish to offset that knowledge. Unlike government conduct on the record, which complainants are generally presumed to have known simply because it is on the public record, it may not be as easy to prove knowledge of private behavior that is usually carefully concealed. Likewise, such knowledge of public behavior can hardly be regarded as conclusive in the face of explanations by the defendant government that it has investigated the allegations and found nothing wrong.

Assuming the NVN&I claim survives the defense of foreknowledge, the next obstacle would be the question of government responsibility. There are actually two NVN&I provisions in GATT article XXIII. The only NVN&I provision that has been used to date is sub-section 1(b) which refers to a government "measure" that nullifies or impairs benefits. Doing nothing would not normally be considered a "measure," and on this point WTO tribunals are certain to require strict conformity with the words of the NVN&I remedy, given its exceptional character.

The other NVN&I provision of Article XXIII, sub-section 1(c), applies to nullification and impairment caused by a "situation" for which no government is responsible. The problem of private trade barriers actually fits the words of the "situation" authority quite nicely, and governments have given thought to using it in such cases. On the other hand, the "situation" authority is extremely broad, has never been used as the basis for a prosecuted legal complaint,³⁰ was originally intended to deal with global disturbances such as world depressions, and is roundly criticized by many commentators. Nonetheless, the "situation" authority was reaffirmed when it was included in the Dispute Settlement Understanding negotiated in the Uruguay Round, although rulings on "situation" complaints were set aside from other rulings by being made not legally binding unless adopted by consensus. Although

³⁰ . A "situation" complaint can be teased out of the complaints in two GATT cases. See *Uruguayan Recourse to Article XXIII*, Nov. 16, 1962, GATT B.I.S.D. (11th Supp.) at 95 (1963); *Uruguayan Recourse to Article XXIII*, Mar. 3, 1965, GATT B.I.S.D. (13th Supp.) at 35, 45 (1965); *Japan — Nullification and Impairment of Benefits*, GATT Doc. L/5479 (complaint by European Community, April 8, 1983). The details of the two cases are given in ROBERT E. HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM, 446, 512 (1993).

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controversial, “situation” complaints remain one of the legal tools the WTO might use to address the problem of private trade barriers.

Although it might be possible to bring a successful NVN&I claim against private trade barriers under the present law of the WTO — for example, a “situation” complaint that deals with the foreknowledge issue as suggested above — a more likely approach would be some kind of quasi-legislative approach clearing away the two obstacles discussed here. The WTO General Council does have the power to issue formal legal interpretations, and it would be within that interpretative power to issue an interpretation affirming the validity of the type of situation complaint and foreknowledge defense just suggested.³¹ Alternatively, of course, the members of the WTO could simply negotiate a separate agreement on competition policy that would include an explicit authorization of NVN&I complaints, setting aside these obstacles in whatever manner seemed most appropriate.³²

Assuming a NVN&I claim survives these two threshold obstacles, the core of a NVN&I case will be to prove that there is a private trade barrier of a kind that the complaining government could not have reasonably expected to be there. That, of course, would require establishing that the private conduct in question was in violation of the importing country’s competition laws — or, perhaps, in violation of the type of law that the complainant had reason to expect. This would put a WTO panel into the business of trying what amounts to a competition law claim — a role which most observers seem to think it is not suited for. The characterization of the conduct as wrongful might not be all that difficult in cases involving violation of core competition law principles — the cases most likely to be brought —, but the problem of litigating and finding the facts necessary to establish such a violation could very well be beyond the capacity of a WTO panel.

At this point, it is appropriate to refer back to an earlier observation that these WTO claims are government-to-government legal claims, and do not have direct legal consequences for the private parties whose conduct is being examined. As in the case of WTO litigation under the Reference Paper, it might be reasonable to expect somewhat less meticulous procedures and less rigorous standards of proof than one might have to meet in an ordinary

³¹ . GATT history contains one example in which the NVN&I has been interpreted by the plenary assembly of member governments. The GATT Contracting Parties adopted a “decision” stating that, for purposes of NVN&I, a government receiving a tariff concession had a “reasonable expectation” that certain kinds of subsidies would not be introduced on the product involved. The “reasonable expectation” formula was a way of saying that such a subsidy would constitute NVN&I.

³² . See Hindley, *supra* note 13, at 337. Hindley suggests that the issue of foreknowledge could be disposed of by a negotiated agreement simply ruling out that defense altogether in cases involving private trade barriers. In his view, one of the main subjects to be considered in any WTO agreement on competition policy would be an agreement facilitating the use of NVN&I proceedings by doctrinal refinements such as these.

competition law case. The first case of this kind, if there ever is one, will bear careful watching on this point.

A final point bears repeating. The effectiveness of such a NVN&I remedy, assuming the problems mentioned so far could be overcome, would depend on how the "expectations" of the complaining country were defined. If the expectation is merely that the defendant government would pass the right laws and make a bona fide effort to enforce them, the possibility of winning relief will be reduced substantially in any case where the defendant government has gone through the motions. The NVN&I remedy would be considerably more effective if the "reasonable expectation" were defined more rigorously. This could be done if the simple existence of a private trade barrier were viewed as contrary to expectations, whether or not the government made a bona fide effort to enforce its law, and whether or not the government had the legal power to do anything about it. Conceptually, there would be nothing wrong in treating such an "innocent" imbalance as a situation deserving of remedy, for governments could well agree that exporting countries do not assume the risk of imbalance from that source. If, as one suspects, most governments would be skeptical about claims of innocence where such private barriers are found, such a more rigorous interpretation would probably be politically viable as well. This would be a difficult issue to resolve by adjudication. It should definitely be on the agenda of any attempt to create a NVN&I remedy by negotiation.

IV. CONCLUSION

The exercise of explaining the various options that might be available to the WTO to deal with private trade barriers leaves one with two tentative conclusions. On the one hand, it would be a good idea for the WTO to be very patient in its efforts to elicit greater effort from competition law authorities, for even the WTO's best remedies raise serious problems, and many of the others seem, at first examination, to border on the fanciful. On the other hand, the Reference Paper in the recent Telecommunications Agreement does show that the WTO is capable of writing its own rules when the specific need arises. To be sure, it is yet to be proven that the WTO can define and apply the substantive standards needed to make such rules work. It is also clear that a good deal of work, political as well as legal, will need to be done before the WTO will be able to adopt any more general remedies to deal with the problem of private trade barriers across the board. But if the history of GATT/WTO jurisprudence over the last fifty year teaches anything, it teaches that one should not underestimate the ability of that legal system to work out acceptable legal solutions to serious problems. It is curious how often that has happened when large economic interests are riding on it.

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