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**THE LAW-IN-ACTION OF INTERNATIONAL TRADE LITIGATION
IN THE UNITED STATES AND EUROPE:
THE MELDING OF THE PUBLIC AND THE PRIVATE**

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By Gregory Shaffer¹

From different vantages, the enterprises of international law and international lawyers long have been critiqued for being irrelevant and illusory. Political scientists working in the realist tradition maintained that international law is irrelevant because powerful states simply ignore it when advancing national goals.² Positivist legal theorists maintained that international law is not law because it involves no command issued from a central authority backed by a sanction.³ Again, states

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² See, e.g., Hans Joachim Morgenthau, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (1963) (calling international law "a primitive type of law primarily because it is almost completely decentralized law"); and George Kenan, *AMERICAN DIPLOMACY* (1951) (critiquing legalistic approaches to international relations as based on false assumptions). These same political realists critiqued international law as dangerous for the United States were it to be taken seriously. In their view, a focus on international law as opposed to international politics cloaks strategic concerns essential for the security and advancement of the state in legalistic and moralistic garb that rivals may use to seek advantage and ignore when impeding their interests. See *id.* (maintaining that the "most serious fault" in past U.S. foreign policy was its "legalistic-moralistic approach to international relations"). **GET PINCITE.** Yet in pointing to the danger of international law, legal realists also implicitly accepted that international law might not be irrelevant or illusory.

³ See, e.g., John Austin, *The Province of Jurisprudence Determined* (1832), in *THE GREAT LEGAL PHILOSOPHERS* 352 (Clarence Morris, ed., 1971) (maintaining that international law is not law, but simply a form of "positive morality" because there are no commands issued by a sovereign "armed with a sanction."). Hans Kelsen, on the other hand, states that international law is law, but of a "primitive" form, because it depends on self-help, without any centralized power, to apply it. See Hans Kelsen, *The Nature of International Law, lecture 2*, in *LAW AND PEACE IN INTERNATIONAL RELATIONS* (1942). In a similar vein, H.L.A. Hart contends that international law is like primitive law in that it lacks "secondary rules" to assess the validity of its "primary" substantive rules.

could simply ignore it at whim or will. Yet, regardless of the stringency of one's definition,⁴ international law has ascended in prominence with the Cold War's demise, especially in the economic sphere where states increasingly direct diplomatic endeavors. Nowhere is this more clear than in the realm of international economic law following the creation of the World Trade Organization (WTO) in 1995. Even in a strict Austinian sense, WTO law consists of rules that a centralized supranational institution (the WTO dispute settlement body) enforces through issuing judgments that, if not complied with, trigger sanctions.⁵ All states, even the most powerful states, have either complied with WTO judgments by modifying domestic regulations and practices, or, in the few cases where domestic politics blocked such modification, accepted the resulting sanctions.⁶

Consequently, for Hart, while international law may constitute law, it does not constitute a legal system. See H.L.A. Hart, *THE CONCEPT OF LAW* 213-237 (2d ed., 1994).

⁴ On the notion of an acceptance model of law as opposed to a command model, see Gidon Gottlieb, *The Nature of International Law: Toward a Second Concept of Law*, in *INTERNATIONAL LAW: A CONTEMPORARY PERSPECTIVE* (R. Falk, F. Kratochwil, and Saul Mendolovitz, eds.) 187 (1985). See also Myres McDougal and Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, *cite*. However, international economic rules and norms clearly have more deeply penetrated into domestic systems in recent years. To use Abbott's and Snidal's typology of international hard and soft law varying in terms of the stringency of its legal "Obligation," "Precision" of detail, and "Delegation" to an enforcing authority, WTO law does entail considerably more detailed legal provisions (although many remain relatively vague) that constitute binding legal obligations that, in turn, are enforceable through decisions rendered by a third party adjudicatory system, subject to appellate review. See Ken Abbott and Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *INTERNATIONAL ORGANIZATION* 421 (summer 2000).

⁵ While it is true that the WTO lacks police power to enforce WTO law, it has the power to issue sanctions, so far consisting of the right of the prejudiced member state to raise tariffs on the offending country's exports in an amount that compensates for the impact of the violation. The offending country could, in theory, withdraw from the WTO, but then it would lose all of its rights vis-a-vis third countries in respect of their treatment of its exports, subjecting itself to potentially significant costs.

⁶ In the first five years since the WTO's formation (Jan. 1, 1995-Jan. 1, 2000), over 180 formal claims were filed, and where these claims were been settled, panels have issued judgments under WTO rules. The first two cases where a WTO member failed to comply with a WTO ruling and thus was forced to accept retaliatory sanctions were against the European Communities (EC). See the two controversial trade disputes entitled *EC-Regime for the Importation, Sale and Distribution of Bananas* (EC Bananas case) and *EC-Measures Affecting Meat and Meat Products* (EC Meat Hormones case). **FORMAL CITE**. The reaction of private parties throughout the world in opposition or support of the WTO system and its stream of legal verdicts, demonstrates that WTO international trade law is highly relevant to states and their constituents. See, e.g., Christopher G. Caine, *Powers of Persuasion: Behind the Scenes with the World's Top Lobbyists*, 10 *CORP. LEGAL TIMES* 20 (2000) (interviews by Business Without Borders of lobbyists for multinational corporations on their lobbying strategies and goals for the WTO); Trish Saywell & Yan Zhihua, *Ready for The Deluge*, *FAR E. ECON. REV.*, March 23, 2000, at 44 (reporting Chinese companies' preparation and hopes for the WTO); Larry Elliott, *No Sleep Lost Over Seattle*, *GUARDIAN*, Mar. 4, 2000, at 32 (citing WTO Director General Michael Moore's statement that at Seattle, "each delegate had a huge and

The transformation of international law into law, as we more commonly perceive it, is abetted by the melding of the public and the private.⁷ WTO law, while formally a domain of *public* international law, profits and prejudices *private* parties. As international law becomes law, lawyers listen and market their wares. Private parties, in particular well-connected, wealthier and better-organized ones, attempt to use the WTO legal system to advance their commercial ambitions. A more effective WTO public law incites U.S. and European private legal strategies, which in turn yields further WTO public law.

This article examines the use of formal and informal mechanisms in the United States and the European Union (EU)⁸ through which private firms and governmental authorities collaborate to

aggressive section of civil society with them"). Because private constituents perceive WTO law as potentially effective, they increasingly press, formally and informally, to play a greater role in WTO litigation. *See, e.g.*, Bruce Stokes, *New Players in the Trade Game*, NAT'L J., Dec. 18, 1999, at 3630 (reporting NGOs efforts to gain direct access to the WTO); Charlotte Denny, *It's All a Matter of Balance*, GUARDIAN, Nov. 19, 1998, at 19 ("US government took Europe's banana trade to the WTO within 24 hours of Chiquita Brands making a \$500,000 donation to the Democratic Party."); *see also* Greg Hitt, *Fund Raising for Seattle WTO Meeting Raises Concerns*, WALL ST. J., May 17, 1999, at A28 (noting invitations extended to large corporations, in consideration of a fee, to attend receptions with trade delegates at the WTO Ministerial Meeting in Seattle).

⁷ For a critique of the public/private distinction in international law, *see* Claire Cutler, *Artifice, Ideology and Paradox: The Public/Private Distinction in International Law*, 4 REVIEW OF INTERNATIONAL POLITICAL ECONOMY 261 (1997). The liberal project to establish international law also has been critiqued by feminists and other critical legal scholars for its maintenance of a public-private distinction, focusing on public issues of national security and economic relations negotiated by predominantly male elites, and failing to address private issues relevant to individuals and communities. *See, e.g.*, Hillary Charnsworth, *Feminist Methods in International Law*, 93 AM. J. INT'L L. 382 (April 1999) (noting that "the operation of public/private distinctions in international law provides an example of the way that the discipline can factor out the realities of women's lives"); and Hillary Charnsworth, Christine Chinkin and Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. (1991) (critiquing the "masculine world of international law" and its "public-private distinctions"). While this article examines the melding of the public-private distinction in international economic law, it does not directly address the concerns of feminist and other critical theorists over a male-dominated agenda and discourse in international law.

⁸ The terms EU and EC are used interchangeably in this article. The technical name for the entity representing European Community interests before the WTO is the European Communities or EC. Article XI of the 1994 Agreement Establishing the WTO refers to "the European Communities" as an original member of the WTO. The term EU or European Union, however, is often used by commentators. The name of the regional European entity has changed over time as Europe has continued to integrate in different policy areas. Originally, the term used was the European Economic Community (EEC), or even more accurately, the European Economic Communities. The plural term notes that there are still three European "Communities," one governing the coal and steel sector formed under the Treaty Establishing the European Coal and Steel Community (1951), one governing the atomic energy sector formed under the Treaty Establishing the European Atomic Energy Community (Euratom) (1957), and one governing all other economic sectors, formed under the Treaty Establishing the European Economic Community (EEC) (1957). The Merger Treaty of 1965 created a single institutional structure for these three communities. The Treaty of European Union (TEU) of 1992 changed the name of the EEC to the EC (or European Community), to

challenge foreign trade barriers⁹ within the context of the WTO system. The article shows how public authorities and private firms have reciprocal, though not identical, goals in challenging these barriers. They form public-private partnerships to advance their complementary aims. The development of these public-private partnerships is seen in the actual handling—the “law in action”¹⁰—of most commercial trade disputes, as opposed to the law in the books reflected in the relevant provisions of WTO agreements, U.S. statutes, EC regulations and the EC’s founding Treaty.

The growing interaction between private enterprises, their legal representatives and U.S. and

designate that the European Community had integrated beyond purely economic matters. The TEU also created three separate pillars of activities for the regional block. The first pillar concerned all traditional EC matters, as expanded by the TEU to cover, in particular, European economic and monetary union. The second and third pillars (respectively named Common Foreign and Security Policy, and Justice and Home Affairs) concerned matters not previously within the competence of the EC institutions. The term which encompasses all three pillars is the European Union (or EU). Technically, the trading powers of the European regional block are governed under the first pillar. Similarly, the internal procedures pursuant to which the EC initiates complaints before the WTO are conducted by EC institutions pursuant to the first pillar.

⁹*Foreign trade barriers* include any measure that directly or indirectly results in an impediment to trade. Tariffs and quotas are classic trade barriers. Less transparent trade barriers include internal taxes, which are neutral on their face but are applied principally to foreign imports, internal subsidies, technical standards, licensing requirements, inspections and similar measures that result in increased costs for foreign producers. Firms relying on intellectual property protection maintain that the failure to recognize and enforce intellectual property rights is also a barrier to trade. Although intellectual property protection standards are now incorporated in the international trading system under the TRIPs Agreement, this remains more controversial. See e.g., Jagdish Bhagwati, *Comment by Jagdish Bhagwati*, in *THE NEW GATT: IMPLICATIONS FOR THE UNITED STATES* 111, 111-14 (Susan M. Collins & Barry P. Bosworth eds., 1994).

¹⁰ This article takes a socio-legal, actor-centric approach. It examines the intersection of public law and private money in WTO litigation and in the bargaining within its shadow. It evaluates WTO law in terms of its *effects* on private behavior, as opposed to its formal rules. The evaluation of law in terms of actor behavior as opposed to formal rules was advocated in U.S. legal circles by the legal realists during the intra-war period and, more recently, by “law and society” scholars. For a legal realist approach, see, e.g., Karl Llewelyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1247-49 (1931) (maintaining that scholarship need focus on “the effects of their action [of courts, legislators and administrators] on the laymen of the community”). For a “law and society” approach, see *LAW & SOCIETY: READINGS ON THE SOCIAL STUDY OF LAW* (Stewart Macaulay et al eds., 1995). See also, Stewart Macaulay, *Law and the Behavioral Sciences: Is There Any There There?* 6 LAW & POL’Y 149 (1984) (noting some of the achievements of law and society scholarship and responding to critiques from critical legal studies scholars).

The article’s findings are based on interviews with representatives (and former representatives) of the USTR and other U.S. agencies, the European Commission, EC member state representatives, trade lawyers based in Washington and Brussels and representatives of trade associations who have been involved in the procedures described in this article. The interviews complemented a review of public documentation concerning the relevant U.S. and EC procedures for challenging foreign trade barriers. This article focuses on developments in public-private partnerships from 1995, with the creation of the WTO and the signature of the New Transatlantic Agenda, through the WTO’s third Ministerial Meeting in Seattle in December 1999.

EC public representatives in the bringing of most trade claims reflects a trend from predominantly intergovernmental decision-making¹¹ toward multilevel private litigation strategies involving direct public-private exchange at the national and supranational levels. Given the trade-liberalizing rules of the World Trade Organization, this trend has an outward-looking, export-promoting orientation, comprised of more systematic challenges, in particular by large and well-organized commercial interests, to foreign regulatory barriers to trade.¹² International trade disputes are, in consequence, not purely public or intergovernmental. Nor, however, do they reflect a simple cooptation by businesses, particularly large and well-organized ones, of government officials. Rather, they involve the formation of public-private partnerships to pursue varying, but complementary goals.¹³

Part I of this article provides a framework for analyzing the increasing role of public-private networks in the determination of national policy and the provision of traditional “governmental” services. It addresses two central reasons why actors increasingly participate in public-private partnerships: (i) the demand of understaffed public agencies for informational resources; and (ii) the per capita stakes of the actors in outcomes. Part II turns to the role of public-private networks in U.S. trade policy, examining the mechanisms that private firms employ in the United States to work with

¹¹ In international relations literature, the term “intergovernmental” refers to a concept of international relations in which the primary actors (if not the sole actors) are governments, as opposed to commercial or other civil actors. For a review of “intergovernmental” theory, as opposed to “transgovernmental” and “transnational” theories of international relations, see Mark Pollack and Gregory Shaffer, *Transatlantic Relations in Historical and Theoretical Perspective*, in Mark Pollack and Gregory Shaffer, *TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY*, at 1-... (2001).

¹² This is sometimes referred to as a “neoliberal” orientation. The term neoliberal refers to a model of societal relations in which government regulation of trade is constrained in order to foster the play of market forces driven by private enterprises pursuing profit maximization. In a pure neoliberal model, these private enterprises have direct economic rights to bring claims against trade-regulatory barriers. While most countries do not grant private enterprises the right to bring claims under WTO rules within their jurisdictions, this paper shows how private enterprises can work with government representatives to pursue their interests through intergovernmental negotiations within the “shadow” of the WTO system. The term “neoliberal,” however, also has a second aspect—that of deregulation at the national level. In theory, liberalized trade can be coupled with a strong regulatory state, so long as national regulations do not discriminate against imports of goods and services. See discussion in Gregory Shaffer, *The WTO’s Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO’s Future*, 24 *FORDHAM INT’L L.J.* 608 (2001).

¹³ For an earlier work addressing what the authors term “triangular diplomacy” involving state-state, state-firm and firm-firm negotiations, JOHN STOPFORD AND SUSAN STRANGE, *RIVAL STATES, RIVAL FIRMS: COMPETITION FOR WORLD MARKET SHARES* (1991).

the Office of the United States Trade Representative (USTR) to challenge foreign trade barriers. Under these mechanisms, the USTR, in coordination with private actors, identifies, investigates and takes action against foreign trade barriers, steadily ratcheting up pressure on foreign countries to expand private access to their markets.¹⁴ Part III examines the relevant mechanisms used in the European Union, in particular exchanges between public and private actors under a formally intergovernmental procedure (known as the article 133 process, in reference to the Treaty provision which governs EU foreign commercial relations) and a private petition procedure (known as the Trade Barrier Regulation).¹⁵ Part IV evaluates the contrasts between U.S. and EC public-private partnerships, the reasons for their greater development and effectiveness in the United States, and the trends in the EC toward U.S.-style practice. Part V addresses the extent to which U.S. and EC private firms and trade representatives coordinate transatlantic efforts to challenge more effectively third country trade barriers, as well as domestic regulations within the United States and EC themselves. Part VI examines the reciprocal relationship between the international trading system and these public-private partnerships, constituting the WTO's *law-in-action*.

I. Public-Private Partnerships in Theoretical Perspective [cut?]

Scholars increasingly use the term *governance* as an alternative to traditional forms of *government* as a means to address public policy challenges. By governance, they typically refer to the intentional pursuit of shared goals by a group of actors, which group may or may not include state representatives.¹⁶ To this basic definition, a number of scholars, such as the political scientist

¹⁴ The formal U.S. legal procedures providing for public-private collaboration over foreign trade barriers are known as the Section 301 and Special 301 procedures. Section 301 refers to provisions in the Trade Act of 1974 (as amended), which instruct the USTR to take action against foreign practices that violate U.S. rights under an agreement or otherwise are “unfair” and restrict U.S. commerce. Special 301 refers to a provision added in 1988 instructing the USTR to identify those foreign countries that deny adequate intellectual property protections to U.S. persons, triggering the Section 301 process. See further discussion in Sections I.A and B below.

¹⁵ The intergovernmental procedure is known as the article 133 process, pursuant to which the EC governments meet periodically to determine a “common” EC commercial policy. The private petition procedure is available pursuant to the EC’s Trade Barrier Regulation, the EC’s analogue and response to the United States’ controversial Section 301 procedure. Part II presents these procedures as they operate in practice.

¹⁶ The term “governance,” and the more specific and contested notion of “governance without government,” are increasingly employed in the fields of international relations and comparative politics, yet in those disciplines we

Rod Rhodes, have added the notion of governance by *networks* to complement the traditional classification of hierarchies and markets as the alternative governing structures for “authoritatively allocating resources and exercising control and co-ordination.”¹⁷ In governance by hierarchies in the political sphere, governments issue authoritative commands which are enforced by state judicial and police powers. In governance by markets, individuals make decisions in an uncoordinated fashion that, in aggregate, give rise to economic and social outcomes, such as the setting of prices in the marketplace and the allocation of goods, services and (pre-tax) wealth.¹⁸ By contrast with these two models, Rhodes paints a picture of governance by “self-organizing, interorganizational networks” composed of both state and non-state actors.¹⁹ As much socio-legal scholarship, Rhodes’ analysis

find little agreement on the substance of governance, or on the key actors who take part in it. In the field of comparative politics, for example, Rod Rhodes finds at least six distinct uses of the term floating in the literature. As identified by Rhodes, the six uses of “governance” define the term alternately: (1) as the minimal state; (2) as corporate governance; (3) as the “new public management”; (4) as “good governance”; (5) as a socio-cybernetic system; and (6) as self-organizing networks. Rod Rhodes, *The New Governance: Governing without Government*, 44 POLITICAL STUDIES 652-653 (1996).

¹⁷ Rhodes, *The New Governance*, *supra* note __, at 653. See also John Ruggie, *At Home Abroad, Abroad at Home: International Liberalisation and Domestic Stability in the New World Economy*, 24 MILLENNIUM: JOURNAL OF INTERNATIONAL STUDIES 507 (1995) (differentiating among hierarchies, markets and networks). Ruggie paraphrases Powell in defining “networks as “a collaborative form of organisation, based on complementary strengths, characterised by relational modes of interaction, exhibiting interdependent preferences, stressing mutual benefits, and bonded by considerations of reputation.” See Walter W. Powell, *Neither Market Nor Hierarchy: Network Forms of Organization*, 12 RESEARCH IN ORGANIZATIONAL BEHAVIOUR 295 (1990).

On governance by markets and hierarchies, see e.g., Oliver Williamson, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (1975) (as applied to firm behavior); and THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING (1985). The term “hierarchies” refers to “formal administrative and bureaucratic command systems within a single organization to replace market contracting among autonomous exchange partners as the means by which [economic actors] coordinate the flow of personnel, capital, and goods through the production and distribution processes” See Leon Lindberg, John, Campbell, and Rogers Hollingsworth,, *Economic Governance and the Analysis of Structural Change in the American Economy*, in GOVERNANCE OF THE AMERICAN ECONOMY (John Campbell, Rogers Hollingsworth, and Leon Lindberg,, eds 1991).

¹⁸ These are, of course, idealized conceptions, as no institutions act without serious imperfections. For a critique of markets as “natural, neutral, consensual, and efficient,” see e.g., Claire Cutler, *Global Capitalism and Liberal Myths: Dispute Settlement in Private International Trade Relations*, 24 MILLENNIUM: JOURNAL OF INTERNATIONAL STUDIES 377, 378 (1995). Yet, while it is easy to critique the functioning of any one institution, in an hypothetical state, such as the free market, to be fair, one must do so in comparison with the imperfections that beset other institutions, such as executive, legislative and judicial mechanisms, as well as informal networks.

¹⁹ See Rhodes, *The New Governance*, *supra* note __, at 660. More specifically, Rhodes lays out four basic characteristics of “governance,” which distinguish the term from the traditional notion of “government”:

“(1) *Interdependence between organizations. Governance is broader than government, covering non-state actors. Changing the boundaries of the state meant the boundaries between public, private and voluntary*

blurs traditional categories of public (government/politics) and private (markets/economics).²⁰

International relations theory, until recently, predominantly began with a systemic view of states coexisting in a condition of anarchy, characterized by an absence of centralized authority.²¹ Within the anarchic system, however, states could create order through power (or balance of power) politics, and, under rational institutionalist theory, through regimes in furtherance of states' shared, mutually beneficial goals.²² The focus of these theories, however, remained on states, and not private

sectors became shifting and opaque.

(2) Continuing interactions between network members, caused by the need to exchange resources and negotiate shared purposes.

(3) Game-like interactions, rooted in trust and regulated by rules of the game negotiated and agreed by network participants.

(4) A significant degree of autonomy from the state. Networks are not accountable to the state; they are self-organizing. Although the state does not occupy a privileged, sovereign position, it can indirectly and imperfectly steer networks." Id.

²⁰ The idea of governance of public functions by shifting combinations of public and private actors is, of course, not entirely "new," as suggested by the term "new governance" in Rhodes' 1996 article. The blurring of the public and private becomes an increasingly problematic issue in modern, complex societies. This blurring, however, has long been an issue addressed by legal realists and law-and-society scholars. *See e.g.,* Stewart Macaulay, *Private Government*, in *LAW AND THE SOCIAL SCIENCES* 445, 447-49 (Leon Lipson & Stanton Wheeler eds., 1986) (citing examples such as "company towns," trade associations, internal corporate mechanisms for arbitration and protection against industrial espionage as examples of private actors performing government's three primary functions-- the creation and interpretation of rules, adjudication over their compliance, and the application of sanctions for non-compliance). *See also* Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423-1428 (1982) (maintaining that the public/private distinction arose in order to define an area free from the influence of the state, and that the distinction has eroded as private entities have assumed more power); GERALD TURKEL, *DIVIDING PUBLIC AND PRIVATE: LAW, POLITICS, AND SOCIAL THEORY* (1992) (exploring critiques of the distinction by major social theorists). For German theoretical variants of a more abstract nature, *see* AUTOPOIETIC LAW : A NEW APPROACH TO LAW AND SOCIETY (Gunther Teubner, ed., 1988); and Niklas Luhmann, *The Autopoiesis of Social Systems*, in *SOCIO-CYBERNETIC PARADOXES*, (eds. F Geyer and J van der Zouwen, eds, 1986).

²¹ *See*, for example, the articles in *NEOREALISM AND ITS CRITICS* (Robert Keohane ed., 1986), and in particular, the chapters by Kenneth Waltz.

²² For a neorealist account, *see e.g.,* JOSEPH M. GRIECO, *COOPERATION AMONG NATIONS: EUROPE, AMERICA, AND NON-TARIFF BARRIERS TO TRADE* (1990) (while Grieco agrees that institutions matter, as a neorealist, he focuses on state power and the importance of relative, as opposed to absolute, gains in the negotiation of trade liberalizing agreements). For a rational institutionalist account, *see e.g.,* ROBERT KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984); Ken Abbot, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. OF INT'L L.* 335 (1989). Rational institutionalists are sometimes referred to as "neoliberal institutionalists."

actors.

Regime theorists such as Oran Young and postmodern theorists such as James Rosenau, however, have included many of the same themes in their analysis of governance at the global level.²³ For example, Rosenau notes how governance implies “intentionality” and “shared goals” on the part of the relevant actors, thereby distinguishing it as an organizing concept from both hierarchy (which is lacking in the international system) and markets (which lack the characteristics of intentionality and shared goals).²⁴ Pollack and Shaffer have more recently assessed the role of governance by networks in transatlantic relations.²⁵

As Pollack and Shaffer point out, governance by networks has always existed, insofar as governments and international institutions cooperate with networks of public and private actors in the provision of public services.²⁶ However, the adoption of privatization and deregulatory policies

²³ See also Ruggie, *At Home Abroad, Abroad at Home*, *supra* note __, at 517-522) (differentiating among hierarchies, markets and networks). As Young writes, “At the most general level, governance involves the establishment and operation of social institutions—in other words, sets of rules, decision-making procedures, and programmatic activities that serve to define social practices and guide the interactions of those participating in these social practices... Politically relevant institutions or regimes... are arrangements designed to resolve social conflicts, promote sustained cooperation in mixed-motive relationships, and, more generally, alleviate collective-action problems in a world of interdependent actors.” Oran R. Young, *Rights, Rules, and Resources in World Affairs*, in *GLOBAL GOVERNANCE: DRAWING INSIGHTS FROM THE ENVIRONMENTAL EXPERIENCE* (Oran R. Young, ed. 1997), at 4. There are, of course, numerous variants of regime theory, a fruitful overview of which is provided in *THEORIES OF INTERNATIONAL REGIMES* (Andreas Hasenclever, Peter Mayer, Volker Rittberger, eds., 1997) (contrasting those theories of international regimes which are “interest-based” (i.e. rational institutionalist accounts), from those which are “power-based” (i.e. realist accounts) or “knowledge-based” (i.e. constructivist accounts)).

²⁴ James Rosenau, *Governance, Order and Change in World Politics*, in *GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS* (James Rosenau and Ernst-Otto Czempiel, eds 1992), at 4-6 (“governance is not synonymous with government. Both refer to purposive behavior, to goal-oriented activities, to systems of rule; but government suggests activities that are backed by formal authority, by police powers to insure the implementation of duly constituted policies, whereas governance refers to activities backed by shared goals that may or may not derive from legal and formally prescribed responsibilities and that do not necessarily rely on police powers to overcome defiance and attain compliance. Governance, in other words, is a more encompassing phenomenon than government. It embraces governmental institutions, but it also subsumes informal, non-governmental mechanisms whereby persons and organizations within its purview move ahead, satisfy their needs, and fulfill their wants.”).

²⁵ Mark Pollack and Gregory Shaffer, *Who Governs?*, in Mark Pollack and Gregory Shaffer, *TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY*, *supra* note, at __

²⁶ Mark Pollack and Gregory Shaffer, *Transatlantic Relations in Historical and Theoretical Perspective*, *supra* note __, at...

domestically, and the growth of cross-border trade in a world increasingly characterized by complex transnational interdependence,²⁷ have led to a general movement towards governance by networks. Public institutions have adapted to these developments by shifting responsibility for the provision of many services to the private and voluntary sectors.

This article bridges the domestic and the international in the realm of international trade law by addressing how private actors work with national officials to enforce international rules overseen by an international body, the WTO Dispute Settlement Body. These *mixed networks* of government officials and private groups are brought together by *resource interdependencies*. As Rhodes points out, it is the diffusion of resources among various actors that explains the *need* for new networked forms of governance, since neither central governments nor any other single actor possesses the resources necessary to govern without the cooperation of other actors.²⁸ Governments need informational resources that private actors provide. As Jan Kooiman states, “No single actor, public or private, has all knowledge and information required to solve complex, dynamic and diversified problems.”²⁹

Moreover, this diffusion of resources (whether constitutional-legal, organizational, financial, political, and informational), together with the *per capita stakes* of different actors in supplying these resources, help explain the *relative power and influence* of the actors within these networks. Actors who possess vital resources, and have the per capita stakes in outcomes to organize

²⁷ See analysis in Philip Cerny, *Paradoxes of the Competition State: The Dynamics of Political Globalization*, 32 GOVERNMENT AND OPPOSITION 251 (1997).

²⁸ See Rhodes, *New Governance*, *supra* note __, at . An efficiency-based approach to governance by networks focuses on resource interdependencies as a causal explanation Cf. Claire Cutler, Virginia Haufler and Tony Porter, *The Contours and Significance of Private Authority in International Affairs*, in PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS (eds. Claire Cutler, Virginia Haufler and Tony Porter, eds., 1999), at 333, 337 (distinguishing between efficiency, power, historical approaches to explain the private authority in international affairs).

²⁹ Jan Kooiman, *Findings, Speculations and Recommendations*, in MODERN GOVERNANCE (Jan Kooiman, ed. 1993), at 252. According to Kooiman, governance should therefore be conceived more broadly as the negotiated interactions of public and private actors in a given policy area. In his view, modern society is radically decentered, and government features as only one actor among many in the larger process of socioeconomic governance. See also Mayntz 2000.

and make these resources available, enjoy a relatively favorable position.³⁰ Those with low per capita stakes, even if they constitute the mass of citizens as is the case of consumers, are less likely to engage in policy debates because the per capita benefits of fully understanding the issues and organizing themselves are too low to justify the costs. Even where they could each benefit by collectively contributing to an association representing their interests, they may rather hope to free ride on others. In contrast, interest groups with high per capita stakes are more likely to be aware and understand issues, and thus more likely to obtain and provide information to the policy-making process.

As enterprises increasingly engage in cross-border exchange, their per capita stakes in international economic governance mechanisms rise. Through their encounters with foreign regulatory barriers, they obtain valuable information which they have the incentive to package and forcefully present to domestic and transnational policy-makers. Other constituencies, in contrast, face even greater collective action problems when issues are moved to the international level because of the increased numbers of affected constituencies and the more distant fora— whether Geneva, Washington, Brussels or elsewhere.

II. Public-Private Partnerships in the United States for Opening Foreign Markets: The United States' Leading Edge

The United States is the first country under the GATT trading system³¹ to create a legalistic

³⁰ See e.g. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); NEIL KOMESAR, *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY* 3 (1994), at 8, 68 (“The character of institutional participation is determined by the interaction between the benefits of that participation and the costs of that participation.... Interest groups with small numbers but high per capita stakes have significant advantages in political action over interest groups with large numbers and smaller per capita stakes”). In short, the willingness of an actor to participate depends on both the per capita *benefits* from doing so, as well as the relative informational and organizational *costs* of so proceeding. A power-based approach to network analysis will focus on the characteristics of which private actors participate. See Culter et al., *Contours and Significance*, *supra* note __, at 337.

³¹ The GATT trading system refers to the system under the General Agreement on Tariffs and Trade signed in 1948, focusing on trade in goods. For an overview of the GATT system, see Kenneth Dam, *THE GATT* (1970); and Robert E. Hudec, *ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM* (1993). Upon the creation of the WTO on January 1, 1995, the GATT became one agreement among many under the WTO’s umbrella, including agreements covering intellectual property protection and trade in services.

procedure whereby private firms may petition their government to challenge foreign trade barriers. Much has been written on this procedure, known as the Section 301 procedure, from a legal and normative perspective. In particular, pundits have debated over whether Section 301 has promoted or distorted trade liberalization goals.³² This section, in contrast, examines how Section 301 forms part of a much broader informal process of public-private partnerships behind U.S. challenges to foreign trade barriers, in order to set up a subsequent analysis of their implications for the international trading system.

A. The Rationale and Impact of Section 301: The Forging of Public-Private Partnerships.

Sections 301-310 of the Trade Act of 1974 set forth a procedure whereby the USTR investigates and takes action against foreign trade barriers in response to petitions filed by private firms and trade associations.³³ Section 301 expanded the focus of an earlier provision applying to agricultural trade,³⁴ in order to cover all goods and services “associated with” trade in goods. Congress subsequently further broadened the scope of Section 301 in successive amendments in 1979, 1984, 1988 and 1994, so that the statute now covers foreign barriers to investment, intellectual property protection, and

³² See AGGRESSIVE UNILATERALISM: AMERICA’S 301 TRADING POLICY AND THE WORLD TRADING SYSTEM (Jadish Bhagwati and Hugh T. Patrick eds., 1990). As depicted in the title to this volume, Bhagwati views Section 301 largely as a mechanism for private interests to harness U.S. unilateral power. *See id.* at 35. (Section 301 “replaces economic efficiency with political clout as the determinate of exports in the world trading system”). *Cf.* Alan Sykes, *Constructive Unilateral Threats in International Commercial Relation: The Limited Case of Section 301*, 23 LAW & POL’Y INT’L BUS. 263, 313 (1992) (concluding that the statute “is fairly successful at inducing foreign governments to modify their practices when they are accused of violating U.S. legal rights”); and Thomas Bayard & Kimberly Ann Elliott, RECIPROCITY AND RETALIATION IN U.S. TRADE POLICY 351 (1994) (maintaining that Section 301 “can be a useful tool” to ensure WTO agreements are respected and “in encouraging additional liberalization in areas not covered by the WTO rules”). *See also* Alan C. Swan, “Fairness” and “Reciprocity” in the International Trade Section 301 and the Rule of Law, 16 ARIZ. J. INT’L & COMP. L. 37, [48-49] (1999).

³³ The relevant provisions of the Trade Act of 1974, as amended, may be found at 19 U.S.C. §§ 2411–2420. Under Section 301, the USTR may also self-initiate an investigation, although such self-initiation is often done at the bidding of an industry or firm.

³⁴ Section 301’s immediate predecessor was Section 252 of the Trade Expansions Act of 1962. Enacted in response to new agricultural trade barriers under the EC’s Common Agricultural Policy, Section 252 authorized retaliation against unjustifiable foreign restrictions on U.S. agricultural exports. Section 252, however, was used only twice, once against the EC in response to EC variable tariffs on chicken exports, leading to the U.S.-EC “chicken war,” and once against Canada in response to Canadian restrictions on U.S. meat imports. *See* Robert E. Hudec, GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (1975). Variable tariffs are those that vary (e.g. increase) as the volume of imports increase.

trade in all goods and services. The amended provisions also tightened the requirements on the U.S. executive by establishing narrower deadlines and limiting the President's discretion to avoid taking action following a Section 301 finding of a violation of a trade agreement or of a trade barrier which is not subject to an agreement but is nonetheless "unreasonable" and restrictive of U.S. commerce.

The United States was not only an economic hegemon during the two decades following World War II, but its domestic economy was largely insulated from foreign trade.³⁵ There was correspondingly little demand for congressional involvement in trade policy or politics. But by the mid-1970s, with Europe and Japan revitalized and U.S. trade deficits beginning to bloat, industry pressed Congress to act.³⁶ The impetus for Section 301 and its successive amendments, in particular those in 1984 and 1988, was Congress' view that U.S. markets were disproportionately open compared to foreign markets in an increasingly competitive globalizing economy. Congress believed that GATT rules were too narrow and the U.S. executive branch too accommodating. Congress demanded reciprocity and viewed Section 301 as a lever to obtain it. One way to extract reciprocity, Congress hoped, was to expand Section 301 to target areas not yet covered by international trade rules that were of mounting importance to U.S. industry-- in particular intellectual property protection and trade in services.³⁷

³⁵ In the 1950s, foreign imports totaled about 3% of U.S. production. See I.M. Destler, *AMERICAN TRADE POLITICS* 7 (1995). In 1970, U.S. imports and exports together accounted for about 11% of U.S. gross domestic product, rising to 14% by 1980 and increasing to 29% by 1999. See Table 1, *GDP and U.S. International Trade in Goods and Services, 1970-1998*, in U.S. FOREIGN TRADE HIGHLIGHTS, 1998 (International Trade Administration 1999). See generally Pollack & Shaffer, *Transatlantic Relations in Historical and Theoretical Perspective*, *supra* note __, at __. On the United States as a post-World War II economic hegemon, see ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* (1987).

³⁶ See I.M. Destler, *AMERICAN TRADE POLITICS* 47-53 (1995).

³⁷ See Destler *supra* note __; Bayard & Elliot *supra* note __. Helen Milner notes how firms in the high technology sectors, "where dynamic economies of scale or learning by doing are essential if rapidly growing R&D costs are to be sustained," favored a more aggressive U.S. trade policy, under a reinforced Section 301 process. See Helen Milner, *The Political Economy of U.S. Trade Policy: A Study of the Super 301 Provision*, in *AGGRESSIVE UNILATERALISM* *supra* note __, at 163, 171 (citing with approval Sylvia Ostry, *THE POLITICAL ECONOMY OF POLICY MAKING IN A SHRINKING WORLD: TRADE AND INNOVATION POLICIES IN THE TRIAD* (1989) chap. 2 and 6). Similarly, Susan Sell notes how the intellectual property lobby "astutely packaged its demands as a solution to America's trade woes." Susan Sell, *Multinational Corporations as Agents of Change: The Globalization of Intellectual Property Rights*, in *PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS* (eds. Claire Cutler, Virginia Haufler and Tony Porter, eds.) 169, 175 (1999).

Section 301 can, in this sense, be viewed as a means to counter demands for greater protectionism. See Geza

A procedure, however, is of no value if it is not effectively used. Pressure from executive branch departments prioritizing Cold War foreign policy goals over the goal of expanding foreign market access constrained the use of Section 301.³⁸ As the era of the Marshall Plan and U.S. post-war competitive dominance receded, private firms viewed the Department of State, which coordinated U.S. trade policy through the 1950s, as particularly problematic. They successfully lobbied Congress to create the Office of the United States Trade Representative in 1962 (originally named the State Trade Representative), then to raise the USTR post to a cabinet level position in 1974, and finally in 1988, to transfer authority for making Section 301 decisions from the President to the USTR.³⁹ Through these changes, firms and their congressional allies wished to shift power in executive branch deliberations from those agencies that focused on non-export goals (such as the Departments of State, Treasury and Defense and the National Security Council) to those more likely to defend private export interests (such as the USTR, and on agricultural matters, the Department of Agriculture). The Cold War's demise facilitated this administrative reorganization.

In creating a more automatic Section 301 process presided by the USTR, Congress attempted

Feketekuky, *U.S. Policy on 301 and Super 301*, in *AGGRESSIVE UNILATERALISM*, *supra* note __, at 94-96. By acting more aggressively to challenge foreign trade barriers, advocates of open trade hoped to fend off pressures on Congress to raise U.S. protectionist barriers. *See* Destler, *supra* note __. This strategy is analogous to what has been called the "bicycle theory" of trade policy: "Unless there is forward movement the bicycle will fall over," John H. Jackson, *THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE* 24 (1998). Some commentators have gone so far as to suggest that the Section 301 process constitutes less of a cooptation by business of U.S. government policy than a cooptation of business by the U.S. government. *See, e.g.*, Gilbert R. Winham, *INTERNATIONAL TRADE AND THE TOKYO ROUND NEGOTIATIONS* 316 (1986) (citing one government official describing the cooptation as follows: "When you let a dog piss all over a fire hydrant, he thinks he owns it.").

³⁸ *See* Judith Bello & Alan Holmer, *The Heart of the 1988 Trade Act: A Legislative History of the Amendments to Section 301*, 25 *STAN. J. INT'L L.*, 1, 1 (1988) (citing complaints from Congressmen that "trade is the handmaiden of all other considerations of the U.S. government" and that U.S. administrations "use trade to barter for other non-trade issues"). As Milner also notes, "Congressional frustration with the president's unwillingness to use Section 301 as it was intended impelled Congress to revise the statute." Milner, *supra* note __, at 163, 166.

³⁹ The USTR's decisions, however, remained "subject to the specific direction, if any, of the President." *See* Trade Act of 1974 § 301(a), 19 U.S.C. § 241 (1998). The transfer of authority to the USTR nonetheless permitted congressional committees to call before them the individual who formally made the decision in accordance with the statute, and press that person to take action or explain the reason for failing to take action. Congressional committees could not call the President to testify before them, but they could grill the USTR.

to make the executive more “accountable” not only to Congress, but to industry.⁴⁰ By enhancing USTR authority and constraining executive discretion, Congress has, over time, helped foster coordinated strategies between government and the private sector to pry open foreign markets. The USTR was to report not just to the President, but also to Congress. And industry ensured that Congress knew how the USTR was doing.

Because the United States aggressively challenges foreign market barriers, some commentators criticize U.S. trade policy as a tool for powerful business interests. Sylvia Ostry, former Canadian ambassador during the Uruguay Round trade negotiations, has been widely quoted in maintaining, “America does not have a trade policy. It has clients.”⁴¹ Ostry implies that U.S. interests are up for sale, in particular to those funding presidential and congressional campaigns. The controlling shareholder of the Chiquita banana company, for example, was among the top three contributors to the Democratic and Republican parties in 1998.⁴² With congressional and executive support, the USTR reciprocated by dedicating tens of thousands of personnel hours challenging EC barriers to Chiquita banana imports. This involved four WTO panels, a total of over one thousand pages of written briefs, buttressed by thousands of pages of annexes,⁴³ and an eventual settlement in Chiquita’s interest.⁴⁴ Just as the USTR has fended for Chiquita’s bananas, so it has for Kodak’s

⁴⁰ See Bello & Holmer, *supra* note __, at 34.

⁴¹ See e.g., *At Daggers Drawn: First Bananas, Now Beef, Soon Genetically Modified Foods*, ECONOMIST, May 8, 1999, at 17. Ostry is now with the University of Toronto’s Center for International Studies. For a fuller explanation of Ostry’s views, see, e.g., Sylvia Ostry, GOVERNMENTS AND CORPORATIONS IN A SHRINKING WORLD: TRADE AND INNOVATION POLICIES IN THE UNITED STATES, EUROPE AND JAPAN 19 (1990) (stating “Paradoxically, the role of the private sector in U.S. trade policy making may be connected to the ‘absence’ of government. The private sector role is essentially one of *pluralist activism*... High policy is seen as a responsibility as much of the senior levels of the business community as of the government,”).

⁴² See Brian Morrissey, *Protectionist Clouds Build*, JOURNAL OF COMMERCE, April 26, 1999 (noting Lindner “has given \$2.5 in campaign contributions over the past two election cycles,” during which time he has had breakfast with the then current USTR Mickey Kantor, coffee with Vice President Gore and spent a night in the White House’s Lincoln Room). **Need to verify with Center for Responsive Politics Report- call them**

⁴³ The case was litigated before a WTO dispute settlement panel, the WTO Appellate Body and [two] subsequent WTO arbitration panels respectively reviewing the EC’s failure to implement the decisions and determining the legitimacy and amount of U.S. retaliatory sanctions. See Uli Petersmann, Tulane or gcs...

⁴⁴ See Anthony DePalma, *Dole Says Trade Accord on Bananas Favors Rival*, NYT, April 14, 2001 (“Dole contends that the agreement favors Chiquita Brands International because it establishes a system under which

film, cattlemen's beef and Pfizer's patents, bringing WTO claims on their behalf. Under this conception of privatized trade policy, if business is the USTR's client, then campaign funds and related forms of consideration must constitute USTR's legal fees.

In bringing a case under WTO rules, however, the USTR does not assume the traditional role of a private counsel vis-a-vis its client because the USTR cannot focus solely on winning a case through employing the strongest arguments. Rather, the USTR almost always has a conflict-of-interest with its "client" industry or firm. The USTR must consider potential cases in which other U.S. interests need be defended. Cases involving food and drug standards, subsidies and antidumping claims, to give just three examples, inherently raise these conflicts.⁴⁵ As a result of the intergovernmental structure of the WTO system, firms are forced to work with the USTR as a partner if they wish to successfully challenge trade barriers under WTO rules.

Under the current international system, the relation of U.S. private interests and public authorities is neither as Ostry suggests, that of lawyer-client, nor, as many trade liberals desire, that of firms acting independently of government.⁴⁶ Rather, the separate interests of the USTR and the private sector are reciprocal and overlapping, giving rise to *ad hoc*, hybrid public-private partnerships. The USTR depends on private sector lobbying in order to obtain support in Congress and the administration for adopting USTR policy goals and supporting USTR practical needs, from

European import licenses will be distributed based on import levels from 1994 to 1996.... Chiquita officials generally expressed satisfaction with the agreement...").

⁴⁵ For example, the United States was successful in bringing a claim against Australian leather subsidies, where the WTO dispute settlement panel held that Australia should reimburse the subsidies in question. While the U.S. leather industry would have approved of such a result, the United States was uncertain as to how to proceed, as its preferential tax system for "foreign sales corporations" had also been found to be WTO non-compliant, and the United States did not wish to refund these, which were estimated to involve billions of dollars. *See e.g.* Daniel Pruzin, *U.S. Puts Off Retaliation Decision in Australian Car Leather Complaint*, and *Barshefsky Pledges to Reach out on FSC after Appellate Body Decision*, *Inside U.S. Trade* 5, Feb. 11, 2000, and 17 *Int'l Trade Rep.* 469, March 23, 2000. For an example involving U.S. "Corporate average fuel economy" standards, *see infra* note __ and accompanying text. For an example involving copyright legislation, *see infra* note __ and accompanying text.

⁴⁶ Trade liberals maintain that the defense of private trading rights should be the trading system's driving normative goal. Trade liberals assert that the WTO system is currently insufficient because it does not require that member states permit commercial and consumer interests to directly invoke WTO rules before member state courts. *See e.g.*, Ronald Brand, *GATT and United States Trade Law: The Incomplete Implementation of Comparative Advantage Theory*, 2 *J. LEGAL ECON.* 95, 95-102 (1992); Ernst-Ulrich Petersmann, *CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW* 463 (1991).

the granting of “fast-track” negotiating authority⁴⁷ and the ratification of trade agreements,⁴⁸ to approving the accession of China to the WTO⁴⁹ and the allocation of budgetary funds. In particular, the USTR depends on export-oriented industries to have their employees and management write, call or otherwise lobby congressional representatives to support USTR’s positions. Following the USTR’s successful litigation on behalf of the U.S. spirits industry in the Japan and Korea alcohol cases in 1996 and 1998, the Vice President of the Distilled Spirits Council of the United States (DISCUS) correspondingly testified before the Senate Committee on Finance, “The WTO has played an integral role in our members’ efforts to reduce or eliminate trade barriers and expand their imports to foreign markets.” DISCUS urged Congress “to provide the political and statutory authority [i.e. fast-track] required to strengthen and expand the WTO and reaffirm the leading role of the United States in the international trading system.”⁵⁰

⁴⁷ “Fast track” negotiating authority refers to a procedure whereby Congress grants the executive authority to negotiate trade liberalization agreements under prescribed mandates and subject to congressional oversight, pursuant to which, once an agreement is signed, Congress cannot amend it, but must approve or reject it by an up or down vote. For an overview and assessment of “fast track,” see Harold Hongju Koh, *The Fast Track and United States Trade Policy*, 18 BROOK. J INT’L L. 143 (1992).

⁴⁸ The history of U.S. private sector support of the ratification of trade agreements was not new to the 1990s. As Alan Wolff, a former member of the USTR and now member of the private trade bar, wrote as regards U.S. ratification of the 1979 Tokyo Round agreements, the overwhelming congressional support was attributable in large part “to the laborious process of private sector consultation, in which... trade officials and industry representatives worked closely together to promote U.S. commercial interests.” Alan Wm. Wolff, *International Competitiveness of American Industry: The Role of U.S. Trade Policy*, in U.S. COMPETITIVENESS IN THE WORLD ECONOMY 301, 320-321 (Bruce R. Scott and George C. Lodge, eds., 1985).

⁴⁹ See e.g., *Administration Reaches out to Business on Upcoming China MFN Vote*, 17 INSIDE U.S. TRADE 1 (Dec. 24, 1999); Richard W. Stevenson, *White House and Business Groups to Push Congress on China Pact*, N.Y. TIMES, Nov. 16, 1999, at A1, 10 (quoting L. Craig Johnstone, senior vice president for international economic and national security affairs at the United States Chamber of Commerce, who stated “We were asked by the administration if we could deliver the votes,” said L. Craig Johnstone, “We said we could and we will.”). Similarly, in Europe, the Scotch Whiskey Association of the U.K. notes, “We also take the opportunity of WTO Accession to work closely with the Commission on the forthcoming accessions, particularly, China, Russia and Taiwan to ensure that distilled spirits import tariffs in these markets are reduced, ideally to zero, and non-tariff barriers, especially internal tax discrimination, are eliminated. (Remarks of Tim Jackson, head of the Scotch Whiskey Association, at a conference in Geneva in May 1997, distributed at conference, on file) [hereinafter SWA May 1997 Remarks]. Similarly, Jackson confirms, “During the Uruguay round, CEPS [the Confederation Europeen des Producteurs de Spiritueux] worked with the Commission from an early stage to ensure that tariffs were eliminated on brown spirits in Canada, the United States and Japan.” *Id.*

⁵⁰ *Hearings on Trade Agreement Compliance Before the Senate Comm. On Finance* 116th Congress (Feb. 23, 1999) (statement of Mark Z. Orr, Vice President, International Issues and Trade, Distilled Spirits Council of the

In return, the Office of the United States Trade Representative aggressively defends industry interests, be it in multilateral or bilateral trade negotiations,⁵¹ WTO accession negotiations, or WTO litigation. USTR also provides exporting industries with a voice in interagency debates so that the President considers their desires when balancing multiple U.S. interests. When the process is successful, the President and other senior officials promote issues on industry's behalf at the highest level, as when President Clinton raised pharmaceutical patent protection issues during his 1999 visit with Nelson Mandela in South Africa. Yet, other countervailing forces may also intervene, be it lobbying by other commercial interests, such as the generic drug industry, or by activists promoting noncommercial causes, such as the provision of low-cost drugs to African AIDS victims.⁵² Despite what some commentators suggest, firms are not "clients" that can dictate USTR actions, and the USTR is not a gun for hire. Firms must rather continually negotiate *ad hoc* partnerships with the USTR, collaborating with the USTR where their interests coincide and domestic politics permits.⁵³

B. Overview of Section 301: The Law in the Books. Section 301 sets forth four grounds

United States, Inc. (DISCUS)).

⁵¹ See e.g. *Ukraine Named 'Priority Foreign Country' under USTR's 'Special 301' IPR Provision*, 18 INT'L TRADE REP. (BNA) 429 (March 15, 2001) (quoting the reaction of Eric Smith, President of the International Intellectual Property Alliance, "The U.S. government put enormous resources into the effort to convince Ukraine to take action. We thank them for their support.").

⁵² See Steven Meyers, *South Africa and U.S. End Dispute Over Drugs*, NEW YORK TIMES, Sept. 18, 1999, at A8 (stating that 300 protesters gathered in Philadelphia in June, 1999 to chant "Gore's greed kills!"); Doug Ireland, *AIDS Drugs for Africa*, NATION, Oct. 4, 1999, at 5 (noting how demonstrators from ACT UP chanted "Gore's greed kills" in order to pressure the administration to change its policies vis-a-vis South Africa). Vice-President Gore was co-chairman of the U.S.-South Africa/Bi-national Commission on pharmaceutical issues. Eventually the Administration capitulated. See Gary Yerkey, *President Orders Easing of IPR Policy For Sub-Saharan Africa to Help Fight AIDS*, 17 Int'l Trade Rep. (BNA) 792, May 18, 2000.

As for controversy over the negative impact of U.S. implementation of the TRIPs Agreement on the U.S. generic drug industry, see Heidi Grygiel, *Now They GATT Worry: The Impact of the GATT on the American Generic Pharmaceutical Industry*, 6 BALTIMORE INTELL. PROP. L. J. 47 (1997).

⁵³ This article's analysis of the reciprocal relationship between public and private interests in the law and politics of international trade is somewhat analogous to that of the political realist Robert Gilpin's analysis of the relationship between public and private interests in the economics and politics of foreign direct investment. See Robert Gilpin, *U.S. POWER AND THE MULTINATIONAL CORPORATION: THE POLITICAL ECONOMY OF FOREIGN DIRECT INVESTMENT* 140 (1975) (stating "corporations and the U.S. government have tended to share an overlapping and complementary set of interests"). Gilpin also notes, "The relationship between economics and politics, to restate the theme of this book, is a reciprocal one." *Id.* at 41.

pursuant to which the USTR may bring a WTO complaint or otherwise respond (and possibly retaliate) against a foreign country practice that restricts U.S. exports. Two of the grounds formally require “mandatory action,” and respectively concern the violation of “any trade agreement” or the violation of any “international legal rights of the United States.”⁵⁴ In practice, at least as regards the WTO’s [142] members, these “mandatory” grounds should be based on alleged violations of one of the WTO’s 19 substantive agreements.⁵⁵ The remaining two grounds are listed under a section entitled “discretionary action,” and respectively grant the USTR the power to take action where a foreign practice “restricts United States commerce” and is either “discriminatory” or “unreasonable.”⁵⁶ The term “unreasonable” has been used since the original 1974 version of Section 301, but was left undefined until 1984. In 1988, the definition was expanded to comprise any act that is “unfair or inequitable,” including the following potpourri of examples:

“(i) [denial of] fair and equitable—

(I) opportunities for the establishment of an enterprise,

(II) provision of adequate and effective protection of intellectual property rights

notwithstanding that the foreign country may be in compliance with specific obligations of the [TRIPS Agreement]...,

(IV) market opportunities, including the toleration by a foreign government of systematic anti-competitive activities...,

(ii) constitutes export targeting, or

(iii) constitutes a persistent pattern of conduct that—

(I) denies worker the right of association,... [and a list of other labor rights].”

⁵⁴ Cite 301(a)

⁵⁵ Prior to the creation of the WTO, private parties also brought Section 301 cases in response to alleged violations of bilateral agreements, such as “Friendship, Navigation and Commerce Agreements.” See Raj Bhala and Kevin Kennedy, *WORLD TRADE LAW: THE GATT WTO SYSTEM, REGIONAL ARRANGEMENTS, AND U.S. LAW* 1024-1025 (1998). The WTO Dispute Settlement Understanding, however, constrains U.S. retaliation on account of alleged violations of bilateral agreements, as discussed in [Part I.D] below, especially where the United States unilaterally determines whether a violation has occurred and what the proper remedy should be.

⁵⁶ Cite 301(b)

Foreigners criticize these discretionary grounds, in particular, because they open-endedly grant authority to the USTR to impose unilateral trade restrictions on account of a practice that does not violate any WTO or other legal obligation, but irks some U.S. producer interest.⁵⁷

In 1988, under congressional pressure to respond to the United States' growing trade deficit, in particular vis-a-vis Japan, the Reagan administration agreed to further toughen Section 301 by adopting three new mechanisms, known as Super 301 (which targets "priority" foreign practices),⁵⁸ Special 301 (which targets intellectual property protection in "priority foreign countries"),⁵⁹ and telecom 301 (which targets "priority" foreign telecommunications markets).⁶⁰ After the USTR consulted with the private sector and obtained its support,⁶¹ the administration developed a sliding scale under Super and Special 301 whereby relevant countries and practices are placed in one of three categories: (i) "priority" countries and practices; (ii) those on a "priority watch list;" and (iii) those on a "watch list." As examined below, private firms have attempted to use these categories and the deadlines built into the process to steadily jack up pressure on foreign countries to change their regulatory behavior.

In deciding whether to initiate an investigation into a trade matter, the Office of the United States Trade Representative does not act alone, but works through an interagency process. The

⁵⁷ As the human rights scholar Philip Alston writes in respect of the labor provisions in Section 301, "the form in which the standards are stated is so bald and inadequate as to have the effect of providing a carte blanche to the relevant U.S. government agencies, thereby enabling them to opt for whatever standards they choose to set in a given situation." Philip Alston, *Labor Rights Provisions in U.S. Trade Law: 'Aggressive Unilateralism?'*, 15 HUMAN RIGHTS QUARTERLY 1,7-8 (1993).

⁵⁸ Under Super 301, the USTR is to identify "priority foreign practices" whose elimination "is likely to have the most significant potential to increase United States exports." While Congress provided for no termination date for Special 301 and telecom 301, it initially created Super 301 for a two year period. President Clinton continued it by executive order during most of his time in office. Super 301 was last reinstated for a one-year period by Executive Order in March 1999. **VERIFY RE BUSH; CITE SUPER 301**

⁵⁹ Under Special 301, the USTR is to identify, on an annual basis, "priority foreign countries" that "(A) deny adequate and effective protection of intellectual property rights, or (B) deny fair and equitable market access to United States persons that rely upon intellectual property protection." **CITE**

⁶⁰ **ADD formal cite**

⁶¹ See Judith H. Bello and Alan F. Holmer, "*Special 301*": *Its Requirements, Implementation, and Significance*, 13 FORDHAM INT'L L.J. 259, 267 (1990).

relevant interagency committees are the “Section 301 committee” and the “Special 301 committee,”⁶² which bring together lower level officials from most federal agencies, including the Departments of State, Treasury, Commerce, Defense, Agriculture and Transport, the National Security Council, the Food and Drug Administration and the Environmental Protection Agency. A USTR representative chairs the meetings, and is typically viewed by firms as their primary supporter in the process. If these agency officials do not agree on a matter, they refer it to committees assembling more senior officials (named in order of referral, the Trade Policy Staff Committee, the Trade Policy Review Group and, ultimately, members of the President’s cabinet). In practice, the lower level Section 301 and Special 301 committees avoid referral by obtaining guidance informally from their superiors.⁶³

Despite some of its “mandatory” language, Section 301’s legal criteria remain sufficiently subjective to grant the interagency committees considerable discretion in all cases. As former USTR Robert Strauss remarked, Section 301 is “mandatory but not compulsory.”⁶⁴ Even in “mandatory” cases, there is a gaping hole in the procedure since the USTR retains discretion whether to commence an investigation in the first place.⁶⁵ In the statute’s twenty-five year existence, no administrative decision involving a Section 301 private petition has been subjected to judicial review because, in practice, private firms and the USTR informally coordinate a strategy before any formal petition is filed or investigation commenced.⁶⁶ If firms are to successfully challenge a foreign market

⁶² Check if there is a telecom 301 committee or any others

⁶³ Interview with Irving Williamson, former chair of the Section 301 Committee, May 1999 [Hereinafter Williamson Interview, May 1999].

⁶⁴ Bello & Holmer, *supra* note __, at 12.

⁶⁵ Section 302 merely provides that “The Trade Representative shall review the allegations in any petition...and... shall determine whether to initiate an investigation,” and “if the Trade Representative determines not to initiate an investigation... the Trade Representative shall publish notice of the determination, together with a summary of such reasons, in the Federal Register.” Trade Act of 1974 § 301, 19 U.S.C. § 2412 (1998).

⁶⁶ See Bhala and Kennedy, *supra* note ____, at 1045-47 (discussing criteria under which a Section 301 determination could potentially be subject to judicial review). In support of judicial review of Section 301 determinations, see Erwin Eichman & Gary Horlick, *Political Questions in International Trade: Judicial Review of Section 301?*, MICH. J. INT’L L. 10 (1989); and Kevin C. Kennedy, *Presidential Authority under Section 337, Section 301 and the Escape Clause: The Case for Less Discretion*, 127 CORNELL INT’L L. J. 20 (1987). In opposition, see Robert E. Hudec, *Thinking about the New Section 301: Beyond Good and Evil*, in AGGRESSIVE

barrier, they must necessarily rely on U.S. public authorities to ultimately represent their interests. They thus work the Section 301 process with the USTR as a partner, and not as a bureaucracy whose hands they can force through a domestic legal proceeding.

C. The Strategic Use of the Process by Firms. Successfully working the Section 301 process requires inter-firm coordination, an intensive exchange of information between public and private representatives, strategic use of leverage points against foreign governments, and the harnessing of political clout.

1. Coordinating through Trade Associations. First, unless one or two firms dominate an industry, such as Boeing for airplanes or Chiquita and Dole for bananas, firms enhance their chances of successfully challenging foreign trade restrictions when they coordinate their activities through a trade association. They thereby present a united industrial front, maintaining that they represent a broader national interest. They may also more effectively rally political support in Congress where needed.

There are trade associations for just about everything in Washington. Just to cover the capital's daily special of pork, milk and corn, there are the National Pork Producers Counsel, the National Milk Producers Foundation and the Corn Refiners Association. For firms relying on intellectual property protection, there are the Pharmaceutical Research and Manufacturers of America (PhRMA), representing the pharmaceutical industry, and the International Intellectual Property Association (IIPA), representing the publishing, film, recording and software industries.⁶⁷ Firms also form *ad hoc* associations targeting specific foreign practices: witness the Coalition against Australian Leather Subsidies. The Coalition brought a Section 301 petition in [1996] challenging Australia's grant of subsidies to its leather industry, a petition that the USTR used to

UNILATERALISM, *supra* note __, at 113, 122.

⁶⁷ PhRMA does not include generic drug companies [to confirm membership- see website info Meghan printed out]. The IIPA coalition is comprised of the Association of American Publishers Inc., the American Film Marketing Association, the Business Software Alliance, the Interactive Digital Software Alliance, the Motion Picture Association of America, Inc., the National Music Publishers Association, Inc. and the Recording Industry Association of America, Inc. See International Intellectual Property Alliance at <<http://www.iipa.com>>

negotiate Australia's termination of subsidies. Yet, since the Coalition remained unsatisfied, the USTR successfully brought a WTO case in May 1998 against Australia's remaining subsidies for "automotive leather," which prompted Australia to agree to remove its subsidies in 1999.⁶⁸

WTO cases increasingly demand significant time, expense and effort. The USTR is unlikely to expend scarce resources and limited political capital within the U.S. interagency process and vis-a-vis foreign governments when a claim does not have broad industry support. Where the USTR agrees to form an *ad hoc* public-private partnership on a specific trade matter, it wants a strong partner. Large and well-organized commercial interests are, as a result, more successful in working the process.

2. Exchange of Information. It is insufficient, however, for firms to simply act collectively and garner Congressional backing. To convince the Office of the United States Trade Representative to take a case to the World Trade Organization, a firm must normally present the USTR with a strong legal case supported by a detailed factual record.⁶⁹ The USTR wants a strong partner not only in terms of ensuring broad industry support; it wants a winning case. The USTR does not want to waste its resources, impair its international credibility, and tarnish its reputation before Congress by bringing and then losing a weak legal case before the WTO. Some in the Washington trade bar maintain that the Japan- Photographic Film case-- also known as the Kodak-Fuji case after the firms behind the "intergovernmental" suit-- exemplifies what can go wrong when the USTR pursues a WTO case for political reasons. The United States (and Kodak) lost the case at a vast expense of resources, which left the USTR on the defensive when it then requested Congress to grant it fast-track authority to negotiate new trade agreements.

Building a strong legal case requires an intensive exchange of information between the USTR

⁶⁸ However, the U.S. was still unsatisfied with Australia's implementation of the panel decision, stating that the entire grant package had not been repaid to the government by the Australian beneficiary of the subsidy. See Daniel Pruzin, *U.S., Australia to Renew WTO Battle over Automotive Leather Export Subsidies*, 16 INT'L TRADE REP. (BNA) 1632-33 (Oct. 13, 1999). UPDATE CITE re outcome.

⁶⁹ Kodak's attorneys at the law firm of Dewey Ballantine in Washington clearly recognized this, submitting to the USTR a thousand page Section 301 brief that included a detailed factual analysis. Many trade lawyers nonetheless maintain that the legal case remained weak, so that the USTR should not have taken it, especially at such an early stage in the WTO's history.

and private firms throughout the process. The process begins with the identification of foreign trade barriers and culminates with the bringing of a WTO complaint and, if successful, the monitoring of compliance with its outcome. The USTR has limited resources, in particular to compile and organize the factual basis for a successful WTO litigation. It thus relies on industry assistance. Since U.S. industries, in turn, rely on the USTR to defend their interests before WTO dispute settlement panels, they are pleased to oblige. Firms are, in many ways, the USTR's eyes. Although U.S. embassies may help compile information, firms know best the market in which they operate or are trying to enter.

Large and well-organized firms are often repeat players who, over time, learn to work the 301 system in a routinized manner.⁷⁰ As firms become experienced with the process, they increasingly anticipate what USTR needs. The process becomes routinized. In particular in the area of intellectual property protection, industry associations gather and compile information well in advance of the USTR's annual notice in the Federal Register requesting assistance in identifying and prioritizing foreign trade barriers.⁷¹ The International Intellectual Property Association (IIPA), for example, works with its members to gather information from around the world throughout the year. On the basis of the information gathered, the IIPA prepares a detailed submission to the USTR in early February of each year focusing on copyright "piracy" and inadequate copyright enforcement around the world. In its report, the IIPA stresses the loss of high-wage U.S. jobs and billions of dollars of revenue to the U.S. economy (and implicitly, to the Association's members).⁷² Each February, for example, the Association has submitted a six-hundred page report that specified how USTR should prioritize countries in its final Special 301 report-- categorizing countries as priority foreign countries, countries on the priority watch list, and countries on the watch list. According to an IIPA representative, the Association's success in influencing U.S. governmental priorities is demonstrated

⁷⁰ The term "repeat players" is taken from Marc Galanter's classic piece, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974).

⁷¹ See Request for Public Comment With Respect To the Annual National Trade Estimate Report on Foreign Trade Barriers, 63 Fed. Reg. 59,619 (1998).

⁷² See, e.g. Corbett Daly, *International Intellectual Property Alliance Urges USTR to Step Up Pressure on Ukraine*, 18 INT'L TRADE REP (BNA) 301 (Feb 22, 2001). As for the USTR's response in listing the Ukraine, see supra note __. See also *WTO: USTR Seeks WTO Dispute Panel Over Korean Airport Procurement*, 16 BNA INT'L TRADE REP. 764 (May 5, 1999) [hereinafter *USTR Seeks WTO Dispute Panel*] (citing April 29, 1999 testimony of leaders of the U.S. software-industry to the Senate Foreign Relations Subcommittee);

by the similarity between the IIPA's initial submissions and the government's ultimate findings in the Special 301 Reports.⁷³

Since not every country can be a priority foreign country, the Association targets those countries of greatest economic value (in terms of lost revenue) and precedential value (in terms of the global impact of winning a case). A sophisticated association thinks like a successful public interest lawyer. As one trade lawyer noted, "You do not bring *Brown vs Board of Education* until you successfully establish a supportive case law."⁷⁴ To enhance pressure on developing countries to enact and implement more protective copyright laws, the IIPA wants USTR to choose cases that it can clearly win under the TRIPs Agreement (the Agreement on Trade-Related Aspects of Intellectual Property Rights).

The USTR uses the submissions of private firms to pressure foreign governments to change their practices prior to USTR publishing its annual reports. The process is constructed to stimulate negotiations. This often results in a fight over the facts well before the USTR initiates a Section 301 investigation or files a complaint at the World Trade Organization.⁷⁵ The debate over the facts involves not only U.S. and foreign governmental representatives, but also U.S. (and sometimes foreign) firms and their legal representatives.⁷⁶ If the foreign government does not undertake to change its practices or otherwise convince USTR that the U.S. industry has misrepresented the facts, it is listed in the relevant report.

3. Working the Interagency Process. Once the association compiles the relevant information, it attempts to "educate" the members of the interagency 301 Committee about the facts. Associations typically start with the Office of the United States Trade Representative since the USTR leads the interagency process and is viewed as their ally and primary partner in the process. Associations, sometimes in coordination with their member firms, pay periodic visits to every agency

⁷³ Interview with IIPA representative (May 1999) [hereinafter IIPA Interview, May 1999].

⁷⁴ Interview with member of Washington trade bar (May 1999).

⁷⁵ IIPA Interview, *supra* note ____.

⁷⁶ See *infra* note ____.

representative on the Section 301 committee, as well as their superiors within these agencies. Since there are divisions within, as well as between government agencies, an industry needs to create strong working relationships with key contacts in each agency in order to teach them to appreciate-- and support-- industry's concerns.⁷⁷

Firms most frequently cite the Departments of State, Treasury and Defense as "problem agencies." Treasury may oppose challenging a foreign trade barrier because an aggressive trade action could interfere with Treasury's efforts to shore up a country's financial system. The Defense Department will not want to compromise its use of air bases in Turkey over complaints about "pirated" Disney videos or Puff Daddy compact discs, no matter how valuable they may be to a U.S. industry or firm.

Trade associations are generally most concerned with the Department of State. There is an old saying among Washington lobbyists that, "In the Department of State you can find a desk for every country in the world except for the America desk."⁷⁸ Ambassadors are promoted because they are "diplomatic" and maintain good relations with officials of the countries where they are based. Associations report that they often must work to counter (what they term) "misinformation" provided by a foreign country desk in the Department of State, forwarded from a U.S. foreign embassy, which in turn was obtained from foreign government sources.⁷⁹

The dialogue, in other words, becomes more than an intergovernmental one. It involves private firms debating factual and legal issues with representatives of multiple U.S. agencies and foreign government officials. Foreign firms may also hire Washington lawyers to present their version of events, further complicating the process. In the Kodak-Fuji case, for example, Fuji hired a U.S. law firm to respond to Kodak's Section 301 petition and, ultimately, to assist it (and Japan) in the WTO "intergovernmental" procedure. The combined legal fees of Dewey Ballantine (for

⁷⁷ Confirmed in interviews with trade association representatives in the intellectual property and food industries, as well as Washington trade lawyers (May 1999).

⁷⁸ Telephone Interview with Gary Horlick, partner at O'Melveny & Myers, (May 1999). *See also* Paula Stern, *Commentary*, in *AGGRESSIVE UNILATERALISM*, *supra* note ____, at 191, 193-194 (citing Congressional concerns with the State Department).

⁷⁹ Interviews with representatives of intellectual property and distilled spirits trade associations (May 1999).

Kodak) and Wilkie Farr & Gallagher (for Fuji) were estimated to exceed U.S. \$12,000,000 in that case.⁸⁰ The fight over the facts, occurring throughout the Section 301 and WTO process, can be an expensive one, again favoring large and well-organized commercial interests.

4. Inciting Congressional Pressure. Industry, however, does not rely on mere persuasion of agency representatives about the facts. Firms work the political process as well, contacting congressional representatives directly and in coordination with industry associations, whether through their own "government affairs" divisions or through hiring outside lobbyists.⁸¹ Firms press their case to local congressional representatives and those on the international trade subcommittees of the Senate Finance Committee and the House Ways and Means Committee. Local congressional representatives, in turn, also pressure members of these committees. Whenever a USTR official visits Congress, congressional representatives raise specific trade matters-- whether about meat, steel rods or raw hide leather-- however unrelated to the meeting's agenda. In the bananas case, for example, the local congressional representative from Cincinnati, Ohio (the headquarters of Chiquita bananas), rallied key members of the trade subcommittee of the Ways and Means Committee to demand that the USTR bring the WTO case.⁸² When the EC did not comply with the WTO Appellate Body's ruling, Congressional representatives drafted legislation that would have compelled the USTR to retaliate had the President not responded by committing to retaliate on his own. To assure a doubting Congress, a vulnerable President Clinton was compelled to confirm this undertaking by

⁸⁰ See John Maggs, *US Goes to War over Film in Japan*, J. Com., June 14, 1996, at 1A. Confirmed in interview with member of the Washington trade bar (May 1999).

⁸¹ Many of the leading outside lobbyists in Washington are law firms with major international trade practices. For example, in terms of first semester 1999 lobbying receipts, Patten, Boggs was rated number two, Akin, Gump, Strauss, Hauer & Feld, number five, and Hogan & Hartson number seven among lobbying firms in Washington. See Mel Lewis, *Spheres of Influence Grow in Washington*, N.Y. TIMES, Nov. 16, 1999 at C1, C27. Former USTR and Democratic National Committee Chairman Robert Strauss is a name partner and leading lobbyist at Akin, Gump, Strauss, Hauer & Feld. David Aaron, former Undersecretary of Commerce of International Trade and a non-lawyer, joined Dorsey & Whitney in Washington in March 2000. See *Aaron to Leave Commerce Dept. in March for Law Firm*. Hogan & Hartson even wooed Hugo Paeman, the EC's chief ambassador during the Uruguay Round and then chief of the Commission's Washington delegation, to join it at the end of 1999. See W. John Moore, *Trans-Atlantic Clout*, National Journal 421, Feb. 5, 2000 and *Former Head of EC Washington Delegation Joins Hogan & Hartson*, INSIDE U.S. TRADE 14 (Dec. 10, 1999).

⁸² Interview with the House and Senate staff members to those subcommittees (May 1999).

letter to the Senate Majority Leader and the Speaker of the House.⁸³

In the meat hormones case, the beef industry likewise pressured the USTR to take its case to the WTO and to retaliate against the EC for failing to comply with the WTO Appellate Body's ruling. The beef industry's trade organizations-- the American Meat Institute, the National Cattlemen's Association and the U.S. Meat Export Association-- orchestrated a country-wide press on the USTR.⁸⁴ With members throughout the country, the beef industry could press large numbers of congressional representatives to demand action. As one USTR representative stated, "We know the intensity of the issue by how we are approached. A phone call from a Congressman means a lot more than a letter. Phone calls from Congressmen throughout the country mean even more."⁸⁵ The threat of draft legislation forcing the USTR to act is perhaps most persuasive. Companies and industries having significant operations in politically important states--such as California, New York, Texas and Florida--may more effectively work the political process.⁸⁶

Congress retains a number of devices to pressure the USTR in addition to threatening to pass legislation compelling action. Even were the President to veto such legislation, Congress can make the administration's life difficult. The USTR may rely on a congressional representative's support for a renewal of "fast-track" negotiating authority or for a vote on Chinese accession to the World Trade Organization. Similarly, a key congressional representative could withhold support for funding a new USTR hire, or for promoting a USTR official to a senior post.

5. The Use of Leverage Points: Publishing Reports and Initiating Investigations. The overall Section 301 process is designed to establish a series of leverage points to pressure foreign governments to change their trade policies and practices. The U.S. government thereby hopes to

⁸³ See Marc Selinger, *Clinton Averts Vote on EU Trade*, WASH. TIMES, October 13, 1998, at B9. President Clinton was particularly politically vulnerable at the time, autumn 1998, in the wake of the Monica Lewinsky scandal and House impeachment hearings.

⁸⁴ Interview with representatives of each of these trade associations (May 1999).

⁸⁵ Interview with USTR member of the Section 301 committee (May 1999).

⁸⁶ See Judith H. Bello, *Some Practical Observations About WTO Settlement of Intellectual Property Disputes*, 37 VA. J. INT'L L. 357, 359-60 (1997)..

steadily ratchet up pressure on foreign governments through presenting them with a succession of deadlines, each one resulting in a step toward formal WTO litigation or other U.S. action. These steps include the following: (i) the deadline for private submissions of information to the USTR concerning foreign trade barriers, which are provided in anticipation of the USTR's annual trade reports to Congress; (ii) the deadline for the publication of such USTR reports which, in turn, prioritize countries and their practices; (iv) the deadline for initiating and concluding Section 301 investigations; and (v) the many deadlines in the WTO system for consultations and litigation. These successive deadlines are used to focus negotiations between the USTR, acting on behalf and in coordination with U.S. private commercial interests, and foreign governments.

The USTR publishes its annual Special 301 Report and its National Trade Estimates Report on Foreign Trade Barriers (also known as its Super 301 or NTE report) in the context of private industry submissions and office visits, backed by Congressional letters, phone calls, questioning before committees and threatened legislation. Each year the reports get longer.⁸⁷ The Super 301/NTE reports identify trade barriers on a country-by-country basis, estimating "the impact of these foreign practices on the value of U.S. imports."⁸⁸ This forms the basis for prioritizing country practices to be challenged. The Special 301 reports categorize countries as priority foreign countries, those on the "priority watch list" and those on the "watch list," setting the basis for a U.S. complaint in each case. In the 1999 Special 301 Report, for example, the USTR announced that it was filing three new WTO claims under the TRIPs Agreement, listed sixteen countries on the priority watch list, and listed thirty-seven more on the watch list. In publishing the 1999 Super 301 Report, the USTR announced that it would initiate three new WTO cases and one new Section 301 case.⁸⁹

⁸⁷ The annual Trade Policy Agenda and Annual Report has expanded every year from a 112 page report in 1995 to a 289 page report in 1999. The National Trade Estimates Report has recently grown from 387 pages in 1997, to 411 pages in 1998, to 436 pages in 1999. **UPDATE**

⁸⁸ USTR, 1999 National Trade Estimate Report on Foreign Trade Barriers 1 (1999).

⁸⁹ In addition, the USTR issues annual reports on government procurement practices and barriers in the telecommunications sector. *See e.g.* Gary Yerkey, *Telecommunications: U.S. Threatens Trade Action Against Mexico, Colombia, South Africa and Taiwan*, 18 INT'L TRADE REP (BNA) 528 (April 5, 2001) (in response to U.S. carrier complaints under Section 1377 of the Omnibus Trade and Competitiveness Act of 1988 requiring an annual review). Its report on foreign government procurement practices was initially required under Title VII of the Omnibus Trade and Competitiveness Act of 1988 and was reinstated, simultaneously with Super 301, by Executive

The USTR, working with industry, uses the publication of Super and Special 301 annual reports as one of a series of leverage points to ratchet up pressure on foreign governments to change their practices. The USTR consults with the foreign government as to what USTR will include in the reports, and even provides “draft” reports (subject to revision) to foreign officials in a last ditch effort to persuade them to change a regulatory policy or practice. Foreign governments, from experience, know that a final report’s publication can trigger a Section 301 investigation or the filing of a WTO claim. If the USTR lists a country as a priority foreign country under Special 301 or its practice as a foreign priority practice under Super 301, the 1974 Trade Act requires that the USTR initiate a Section 301 investigation. Yet even if the country is not listed under one of these categories, the USTR can file a WTO claim simultaneously with a report’s issuance or shortly thereafter.

In the words of a USTR representative, the reports’ publication represents a “plateau in an ongoing dialogue.”⁹⁰ The publication date for the Special 301 and NTE reports is currently April 30th of each year, setting a deadline which focuses negotiations. As the USTR official confirms, “The date could be any date. What matters is the deadline.” The USTR negotiates with foreign countries over the removal of trade restrictions notified to it by private firms up to the reports’ publication. USTR attempts to use the reports’ actual publication as a leverage point. If pre-publication negotiations are not successful, the practice will be listed, forming the basis for initiating a WTO claim. Following earlier warnings to the EC, Canada and Argentina, for example, the USTR announced, upon issuance of its 1999 Special 301 Report, that it was filing WTO complaints against them for violating obligations under the TRIPs Agreement.⁹¹ The USTR negotiated in a similar fashion with concerned foreign countries before it published its Super 301 report. Upon publication,

Order in 1999. In the 1999 government procurement report, the USTR also announced that it would seek formation of a WTO dispute settlement panel for a claim against South Korean discriminatory practices in the bidding for the construction of the U.S. \$6 billion Incheon International Airport project. *See USTR Seeks WTO Dispute Panel, supra note ____.*

⁹⁰ Interview with USTR member (May 1999).

⁹¹ *See USTR Initiates WTO Consultations on IPR with Argentina, Canada, EU*, 16 INT’L TRADE REP. (BNA) 763 (May 5, 1999). The TRIPs violations were all identified to the USTR by the pharmaceutical manufacturers’ trade association, PhRMA, in its annual Special 301 submission. **GCS CHECK RESULTS OF THESE CASES**

it announced new WTO cases against the EC (for French subsidies), India (for local content automobile requirements), and South Korea (for discriminatory restrictions on foreign beef).⁹²

U.S. trade associations attempt to strategically use the process. According to a representative of the intellectual property industry, for example, foreign countries now respond to trade association submissions with their own submissions, defending the legality of their practices and explaining why they should not be branded as priority countries.⁹³ Their reaction demonstrates that the process is taken seriously, compelling foreign governments to respond. Firms attempt to use this fight over the facts as leverage to have USTR press foreign governments to change the facts-- that is, in intellectual property cases, to recognize and enforce U.S. patents and copyrights. What matters to firms is to use whatever levers they have available to change the facts on the ground.⁹⁴ In this sense, albeit indirectly, U.S. firms are able to exercise some power over a foreign government's actions.⁹⁵ For the intellectual property industry, for example, Special 301 has been "a huge success," with countries around the world having adopted and strengthened intellectual property regimes.⁹⁶

Once the USTR agrees to act, it works with private industry to determine how best to use the

⁹² See *USTR to Launch Three WTO Cases in Connection with Super 301 Report*, 16 INT'L TRADE REP. (BNA) 762 (May 5, 1999). **CHECK RESULTS OF THESE CASES**

⁹³ IIPA Interview, May 1999, *supra* note ____.

⁹⁴ Even in the Kodak-Fuji case, Kodak's attorneys claimed partial victory when Japan stated in its submissions to the WTO dispute settlement panels how it would enforce its antitrust laws. See Alan Wm. Wolff, *951 Reflections on WTO Dispute Settlements*, 32 INT'L LAW. 951 (1998).

⁹⁵ Robert Gilpin notes that power also has a psychological dimension: "Who can influence whom to do what?" See Robert Gilpin, *U.S. POWER AND THE MULTINATIONAL CORPORATION* 37(1975).

⁹⁶ In the words of an intellectual property lobbyist, "Special 301 is a wonderful process." IIPA Interview, *supra* note _____. This inside view contradicts the assessment of Patrick Low, a leading trade economist and advocate of multilateralism, now director of the research division at the WTO, that "Special 301 has not been a success." Patrick Low, *TRADING FREE: THE GATT AND U.S. TRADE POLICY* 93 (1993). Low's conclusion is cited with approval by another leading trade economist, Anne Kreuger, in her book *AMERICAN TRADE POLICY: A TRAGEDY IN THE MAKING* 68 (1995). With the signature of the TRIPs Agreement, enhanced recognition of intellectual property rights throughout the world, and global sales soaring, the U.S. intellectual property industry would happily disagree. See e.g., Testimony June 24, 1994, Harvey E. Bale, Senior Vice President, Pharmaceutical Research and Manufacturers of America, Senate Finance/International Trade Law "301" Designations (FDCH Congressional Testimony) (maintaining that "Section and Special 301 have earned a special degree of importance because they have served to drive progress" and citing "the most noteworthy successes of Special 301-related trade negotiations, including those with the Andean Pact, China, Hungary, Indonesia, the Philippines, Taiwan and Thailand") [hereinafter PhRMA June 1994 Congressional Testimony].

process's leverage points to have the trade barrier removed. Under Section 301, before initiating an investigation, the USTR must make a "determination," which can ultimately require "mandatory action."⁹⁷ USTR thus avoids formally commencing a Section 301 investigation unless, at the end of the process, the United States will be prepared to retaliate or has another exit strategy. As a former Section 301 committee member states, "Considerable air time is given to the issue of exit."⁹⁸ USTR wants to be sure that, if the foreign government refuses to make adequate concessions, the USTR has a preconceived plan. This is particularly important when the foreign country has an important market for U.S. businesses (as does the EC), because the unilateral U.S. retaliation could trigger counter-retaliation, infuriating other U.S. commercial constituencies. With the advent of the WTO legalized dispute settlement system, the most common exit strategy from unilateral action is filing a WTO claim, which triggers a new series of deadlines. When the USTR accepts a petition or "self-initiates" a Section 301 investigation,⁹⁹ it signals to a foreign country that the U.S. will file a WTO complaint or impose some form of unilateral retaliation if a settlement is not reached by a fixed date.

Although Section 301 grants private firms legal rights to cause USTR to act on their behalf, the process in fact compels the USTR and private firms to act as partners if they wish to successfully exploit it. In the end, a firm depends on the USTR to defend its interests in intergovernmental negotiations or litigation, and the USTR hopes to successfully remove the foreign barrier in the most effective manner so that it receives the firm's future support before Congress. Firms thus rarely file a Section 301 petition against the USTR's advice.¹⁰⁰ A sophisticated firm approaches the USTR before submitting its petition. The USTR reviews and comments on draft petitions before

⁹⁷ The deadline by which the USTR must make its determination is eighteen months in the case of the violation of a trade agreement, and twelve months for all other Section 301 cases other than intellectual property cases that do not involve a trade agreement, for which the period is six months (Section 304(a)). Once the USTR makes its determination, it must implement action within thirty days, with a delay of up to six months being authorized in certain limited circumstances (Section 305(a)).

⁹⁸ Interview with a former Section 301 committee member (May 1999).

⁹⁹ The USTR either self-initiates a Section 301 investigation (under Section 302(b)) or begins an investigation in response to a petition filed by an "interested person" (under Section 302(a)). An interested person includes any domestic association, firm or worker.

¹⁰⁰ Williamson interview, *supra* note __.

recommending that one be filed. If the USTR believes that the Section 301 process is not the most effective means to have the barrier removed, it will so indicate. For this reason, the USTR has rarely had to formally reject a third party petition in Section 301's twenty-seven year history.¹⁰¹

7. Litigating before the World Trade Organization. If the USTR, in consultation with industry, decides to file a complaint before the WTO Dispute Settlement Body, the exchange of information and general coordination between the USTR and the affected industry intensifies. Given the number of complicated cases that USTR counsel must litigate, the tight deadlines imposed by the WTO's Dispute Settlement Understanding, as well as the political stakes of winning or losing WTO cases, USTR often requires industry to submit convincing factual and legal memoranda as a prerequisite to its filing of a WTO complaint.¹⁰² In the Korea-Alcohol case, for example, the USTR asked industry representatives to take pictures of bars, check web sites and advertisements and prepare a detailed market analysis for the USTR before it filed the suit.¹⁰³ To maximize the prospects of victory in the WTO, the USTR wants a strong committed partner.¹⁰⁴

Private industry's role in WTO disputes has grown as WTO cases have become more

¹⁰¹ The last time that the USTR formally rejected a Section 301 petition was over ten years ago, when, in 1988, it rejected a petition filed by the Governor of Michigan concerning Canadian restrictions on the import of automobile components, and another filed by U.S. rice millers' associations concerning Japan's import restrictions on rice. The USTR rejected the Michigan governor's petition on the grounds that government officials are not authorized to file petitions under Section 302 and that the U.S.-Canada Free Trade Agreement was in the process of being implemented. The USTR rejected the petition filed by the Rice Council for Market Development and the Rice Millers' Association on the grounds that the Uruguay Round multilateral negotiations were a more effective means to proceed. **NEED CITE**

¹⁰² As encapsulated in the remarks of one USTR lawyer, "we at USTR rely on industry." Interview with USTR lawyer (May 1999). *See also* Bello, *Some Practical Observations*, *supra* note__ (noting that the "administration's lawyers... rely upon and work closely with the directly affected private parties. The input provided by the latter serves as additional resources and thereby reduces the burden on an administration in WTO litigation.")

¹⁰³ Interview with USTR official (May 1999). Similarly, in the Japan-Alcohol case, EC trade officials required industry to prepare detailed memoranda supporting the case before they were willing to take it to the WTO. Interview with USTR official (May 1999) and a member of the Legal Services division of the European Commission (June 1999).

¹⁰⁴ *See* Bello, *Some Practical Observations*, *supra* note__ (noting how administrative officials "tend to be institutionally risk-averse,"... and thus "are likely to feel substantial pressure to win any challenge they elect to make of another government's practice under any of the WTO agreements.").

factually and legally complex. The EC bananas case, for example, involved over a dozen claims under four WTO agreements.¹⁰⁵ The initial panel decision alone was over four hundred and seventy pages, much of it setting forth the case's factual background involving a detailed description of the EC's byzantine banana quota and licensing regime. In the Japan-Photographic Film case, "twenty thousand pages of original Japanese-source documents were placed in evidence."¹⁰⁶ As WTO panels increasingly employ a highly contextualized, case-specific approach, as opposed to an application of generic rules,¹⁰⁷ the demands on WTO complainants and defendants in presenting and explicating the facts accumulate. Although the USTR still seeks assistance from U.S. embassies, who may prepare helpful studies, industry representatives are fundamental for the establishment of the factual record. U.S. attorneys involved in the bananas case, for example, maintain that a mark of the United States' success is that the factual description in the WTO panel report was largely taken from the U.S. brief.¹⁰⁸ That U.S. factual description had, in turn, been prepared by Chiquita and its lawyers.¹⁰⁹

Because of the demands of the WTO process, industries typically hire Washington trade lawyers to assist them. The Distilled Spirits Council of the United States (DISCUS) hired Michael Hathaway of Nalls, Frazier & Hathaway in Korea-Alcohol. Chiquita hired Gary Horlick of

¹⁰⁵ The relevant WTO Agreements were GATT (1994), GATS, TRIMS, and the Licensing Agreement. Request for Consultations by Ecuador, Guatemala, Honduras, Mexico and the United States, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/1 (Feb. 12, 1996).

¹⁰⁶ See Wolff, *supra* note _____, at 956.

¹⁰⁷ See, e.g., *Communication from The Appellate Body: United States B Import Prohibition of Certain Shrimp and Shrimp Products*, available in Westlaw, 1998 WL 716669 (W.T.O.) (rejecting a generic analysis based on categories of trade measures in favor of a fact-specific analysis based on the "specific case"). Similarly, in the *Meat Hormones* case, the Appellate Body made clear that it would overrule a panel for failing to consider "an objective assessment of the facts," stating: "The duty to make an objective assessment of the facts is, among other things, an obligation to consider the evidence presented to a panel and make factual findings on the bases of that evidence." *EC Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WTDS26/AB/R, WT/DS48/AB/R, 16 January 1998, par. 133. For an overview and analysis of the Appellate Body shrimp-turtle decision, see Gregory Shaffer, *The U.S. Shrimp-Turtle Appellate Body Report: Setting Guidelines toward Moderating the Trade-Environment Conflict*, BRIDGES, Oct., 1998, at 9; and Gregory Shaffer, *United States--Import Prohibition of Certain Shrimp and Shrimp Products*, 93 AM. J. INT'L L. 507 (April 1999) [hereinafter Shaffer, *Import Prohibition*].

¹⁰⁸ Interview with Washington trade lawyer (May 1999). Confirmed in interview with a former member of the Legal Services division of the European Commission (June 1999).

¹⁰⁹ Interview with Washington trade lawyer (May 1999).

O'Melveny and Myers in EC-Bananas. The American Meat Institute hired Carolyn Gleason of McDermott Will & Emery in EC-Meat Hormones. Kodak hired Alan Wolff of Dewey Ballantine in Japan-Photographic Film. In many cases, private counsel entirely writes the first draft of the brief's factual section. For the legal analysis, counsel meets with USTR lawyers throughout the process to develop legal arguments and apply the facts. Counsel provides sample briefs or memoranda from which representatives at the USTR can cut and paste, as well as mark-ups of the USTR's drafts.

The hiring of private lawyers by defendant countries heightens the need for cooperation between USTR and the relevant U.S. industry. Private lawyers may now represent and plead, on behalf of states, before WTO dispute settlement panels¹¹⁰ and the WTO Appellate Body.¹¹¹ In the Korea-Alcohol case, for example, Korea hired a Brussels-based attorney, Marco Bronckers, to defend its interests. According to U.S. industry representatives, Bronckers "threw all sorts of junk at us"¹¹² in an attempt to demonstrate that Korea's tax system, which taxed whiskey "at ten times the rate" of the rice-based *soju*, was nondiscriminatory because (in GATT terms) *soju* was not a competitive or "like product." That is, Korea's attorney devised numerous fact-based arguments designed to show that *soju* and U.S. distilled spirits were not competing products because they were for different markets. In responding to Korea's proposed definition of the relevant Korean product market, the USTR required extensive assistance from DISCUS and its Washington-based attorneys to compare the products' physical characteristics, distillation techniques, advertising and distribution methods, consumer uses and perceptions, and price elasticities.¹¹³

There are limits to this U.S. public-private cooperation, however, leading to tensions between

¹¹⁰ See, e.g., Indonesia— Certain Measures Affecting the Automobile Industry, Report of the Panel, WT/DS54,55,59,64/R (July 2, 1998).

¹¹¹ European Communities— Regime for the Importation, Sale and Distribution of Bananas, Report of the Appellate Body, AB-1997-3, WT/DS27/AB/R (Sept. 9, 1997).

¹¹² Interview with DISCUS representative (May 1999).

¹¹³ A product's price elasticity of demand refers to the impact of a product's price increase (including an account of discriminatory internal taxes) on its consumption.

government officials and firm representatives and their lawyers.¹¹⁴ The core of this tension is that the USTR ultimately is to represent the national interest, not the firm's interest. In particular, the USTR must consider that the United States may subsequently be on the defensive in a similar case. For some issues, such as intellectual property protection, this is less of a problem, since the United States will usually be a claimant. Yet, in antidumping and standards cases, the USTR must be careful not to apply the relevant WTO agreements in a manner that can subsequently be used against the United States.¹¹⁵ Even in copyright cases, U.S. firms may want the USTR to take a tougher position. The United States, for example, was a defendant in a case brought by the EC challenging a provision of U.S. copyright law that exempts the restaurant and bar industry from paying royalties.¹¹⁶ While the U.S. copyright industry hoped that its government would lose the case, and even provided some assistance to the EC,¹¹⁷ the U.S. restaurant and bar industry and its allies on Capitol Hill who enacted the exemption demanded that the USTR vigorously defend it. Consequently, when bringing copyright claims against third countries under the TRIPs Agreement, the USTR might not take as aggressive of a position to limit copyright exceptions as the U.S. copyright industry would like.

The public and private interests collaborating in these public-private partnerships are not perfectly synchronous. As in most partnerships, there are tensions. Yet overall, the current "intergovernmental" dispute system requires that the USTR and industry work together as partners

¹¹⁴ The USTR finds that some firms, and particularly their lawyers, can be overbearing, exacerbating such tensions. Interview with a lawyer at USTR (May 1999).

¹¹⁵ The United States, for example, is the world's largest user of antidumping suits, which, following complication calculations, permit U.S. customs, upon petition of a private industry, to raise a product's tariff to offset the amount by which such product is sold "at less than fair value." As other countries increasingly introduce antidumping laws and suits, U.S. firms are prejudiced. The United States, however, cannot take as strong of a stance as prejudiced industries might like to challenge these third country procedures, because the United States does not wish to undermine its own antidumping policies. Figures on the number of U.S. and EC antidumping suits are found in *The European Union's Trade Policies and their Economic Effects*, OECD Economic Department Working Papers No. 194, at 25 (1998) (showing over 300 U.S. antidumping suits from 1997-1998, almost twice the number in the EC. **Check also update in WTO annual reports.**

¹¹⁶ For a history of the legislation and the tensions between industry interests in the case, see Laurence R. Helfer, *World Music on a U.S. Stage: a Berne/TRIPs and Economic Analysis of the Fairness in Music Licensing Act*, 80 B.U. L. REV. 93 (2000). For the decision of the WTO dispute-settlement panel, see Daniel Pruzin, *Dispute Panel Affirms U.S. Amendment on Music Licensing Violates WTO Rules*, 17 Int'l Trade Rep. (BNA) 730 (May 11, 2000).

¹¹⁷ See *infra* note __ and accompanying text.

if they wish to advance their separate, but reciprocal interests.

D. What's New Since the Formation of the World Trade Organization. Some commentators argued that the World Trade Organization's formation should curtail the use of Section 301.¹¹⁸ This has yet to be the case. From 1995 through 1998, the USTR initiated twenty-four Section 301 investigations, exceeding the annual average over Section 301's prior history. According to a former chair of the Section 301 committee, the existence of the World Trade Organization has in many ways "simplified" the use of Section 301.¹¹⁹

Countries' acceptance of a more legalized WTO dispute settlement system has, in practice, both facilitated and constrained Section 301's use. On the one hand, USTR's decision whether to initiate a Section 301 investigation is now an easier one. The USTR is less concerned about determining an exit option in cases involving a WTO violation, since the USTR can file a WTO complaint. If successful, and the foreign country complies with the panel decision, the process concludes. If the foreign country refuses to comply with the panel decision, the United States may retaliate without the prospect of counter-retaliation. On the other hand, the legalization of the WTO dispute settlement process has rendered trade litigation more time-consuming and expensive. As a result, large and well-organized commercial interests with the assistance of lawyers predominately use the Section 301 procedures.

The WTO system, admittedly, has constrained the use of formal Section 301 investigations for a category of cases. These cases involve WTO members practices that do not violate a WTO obligation and where there is no sanction available against the practice that would not violate a WTO rule.¹²⁰ Yet, since the United States can often exercise leverage in compliance with WTO rules,

¹¹⁸ See e.g. John Gero and Kathleen Lannan, *Trade and Innovation: Unilateralism v Multilateralism*, 21 Canada-U.S. L.J.81, 95 ("Thus the DSU seriously erodes the credibility of unilateral retaliation under Section 301"). See also Robert Hudec, *International Economic Law: The Political Theater Dimension*, 17 U. Pa J. Int'l Econ L 9, 12 (spring 1996) ("More than one WTO delegate opined that, by agreeing to the Understanding, the United States agreed to eliminate the WTO illegal trade practices of Section 301." Hudec notes, however, "This was not what the U.S. delegates were telling the Congress.")

¹¹⁹ Williamson Interview, *supra* note __.

¹²⁰ The constraint on the United States' unilateral use of Section 301 in this category of cases occurred in 1995, the year of the WTO's formation, with the dispute over Japan's aftermarket for the replacement of automotive parts.

especially vis-a-vis developing countries, this category of cases is, in fact, less expansive than often supposed. For developing countries, for example, the United States can always threaten to withdraw preferential benefits that it extends under its Generalized System of Preferences legislation. Intellectual property firms, in particular, have used the Special 301 process and the annual renewal process of the U.S. General System of Preferences program to lobby the USTR to remove special tariff preferences granted to developing countries.¹²¹ Firms have also lobbied for sanctions that exert other forms of pressure. In the Argentinian pharmaceutical case, for example, members of the U.S. intellectual property industry suggested that the U.S. Food and Drug Administration ban the importation of Argentinian beef on the grounds that it is not free of foot and mouth disease. They thereby hoped to coerce Argentina to change its patent law before being

The USTR had self-initiated a Section 301 complaint in 1994 concerning alleged Japanese restrictive practices in this sector and announced sanctions worth \$5.9 billion dollars if Japan did not agree to change its practices and commit to binding purchases of U.S. auto parts. Japan challenged the USTR's threat of unilateral sanctions before the WTO's Dispute Settlement Body. So constrained, the United States negotiated an agreement with non-binding numerical targets which was widely interpreted as a capitulation. See *U.S. Threatens Duties on Luxury Cars Worth \$5.9 Billion in Japan 301 Dispute*, 12 Int'l Trade Rep. (BNA) 849 (May 17, 1995). For an overview of the case, see Tracy Abels, *The World Trade Organization's First Test: The United States-Japan Auto Dispute*, 44 UCLA L. REV., 468 (1996).

The constraint of WTO rules on U.S. unilateral action against Japan was reconfirmed in Kodak's Section 301 case filed in 1995. When Japan refused to yield to U.S. pressure to liberalize its film sector and agree to facilitate an increase in Kodak's market share, the USTR was forced to take the case to the World Trade Organization, where it lost a panel decision in 1998. See WTO Panel Report, *Japan--Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R (Mar. 31, 1998).

¹²¹ The Generalized System of Preferences ("GSP") provides for reduced tariff rates for developing countries. For an overview of the GSP system, see Bhala and Kennedy, *supra* note ____, at 444-469. When the GSP program was renewed in 1984, Congress incorporated new requirements for the protection of U.S. intellectual property as a condition for the granting of GSP benefits. See SUSAN SELL, *POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST* 135 (1998). As an example of industry pressure on least developed countries, see Rosella Brevetti, *Interagency Committee Weighs Industry Complaints Against Six Countries*, 17 INT'L TRADE REP. (BNA) 780, May 18, 2000 (noting industry complaints, in the context of reviews under the GSP program, that Armenia, the Dominican Republic, Ukraine, Kazakhstan, Uzbekistan and Moldova are not adequately protecting intellectual property rights.... At the hearing [of a US interagency committee], Dominican Republic Ambassador pledged to work with U.S. industry stakeholders, including IIPA, to ensure that intellectual property rights are protected and enforced.") As another example, U.S. drug companies, who asserted that "Argentina's refusal to enforce patents is costing them \$540 million a year in lost sales," successfully prompted the USTR to withdraw 50 percent of Argentina's GSP benefits worth \$260 million. See John Maggs, *US is Set to Penalize Argentina for Piracy*, J. COM., Jan: 6, 1997, at 1A. See also, John R. Schmertz & Mike Meier, *U.S. Imposes Trade Sanctions on Argentina for Failure to Protect U.S. Intellectual Property Rights*, 3 INT'L L. UPDATE 34 (1997). As Alan Sykes reports in his 1992 study of Section 301, Section 301 success was "more likely with a GSP beneficiary." See Sykes, *Constructive Unilateral Threats*, *supra* note ____, at 313. This is probably in large part because developing countries are more subject to U.S. coercion in light of the asymmetrical importance of the U.S. market.

obligated to do so under the transition rules for developing countries under the TRIPs Agreement. As one industry representative noted, "This would have gotten Argentina where it hurts."¹²²

Overall, although the WTO system has somewhat constrained U.S. power politics, it has simultaneously triggered greater exploitation by the United States of its comparative advantage in lawyering. The constraints on unilateral U.S. political pressure in a category of cases is offset by the expanding scope of obligations covered by WTO rules, in particular those involving trade in services and trade in products relying on intellectual property rights. Of the twenty-four Section 301 complaints initiated from 1995 through 1998, six involved patents or copyrights. Although only three complaints involved services, the number of services claims could grow in the future.¹²³ With these and other claims, USTR may decide, on a case-by-case basis, whether a formal Section 301 investigation may be strategically used to ratchet up pressure before filing a WTO complaint, or whether a legal complaint should be immediately filed in the context of USTR's informal investigations, periodic Section 301 reports, and ongoing strategizing with affected private interests.¹²⁴

E. The Complementary Power of Ideas: The Role of U.S. Public-Private Partnerships in "Educating" Foreign Governments. U.S. public-private partnerships employ carrots as well as sticks to influence foreign government policies. In the intellectual property field, for example, the offered carrot is that a developing country will attract foreign direct investment, foster higher-end domestic

¹²² Interview with pharmaceutical trade lobbyist (May 1999).

¹²³ The three services-related claims, each filed in 1995, concerned the EC's banana licensing regime. They expressly or implicitly involved alleged violations of the GATS.

¹²⁴ Section 301's time deadlines served a greater role before the World Trade Organization's formation, in large part, since the prior GATT dispute settlement system offered no guaranteed time deadlines of its own. The WTO's Dispute Settlement Understanding now contains deadlines that also can be used as leverage points. For example, Article 4 of the Dispute Settlement Understanding provides that a party may request the establishment of a panel if "consultations fail to settle a dispute within 60 days." Under Article 12, the panel is to render its decision within "six months." In total, the WTO litigation process-- from the time of formal request for consultations through the issuance of the Appellate Body Decision-- should be completed within approximately fifteen months. Because of the WTO system's internal deadlines, the USTR may be more likely to forego a formal Section 301 investigation and directly request consultations before the WTO Dispute Settlement Body. The six cases that the U.S. brought to the WTO in May 1999 following publication of the annual Special 301 and Super 301 reports, skipped the stage of formal Section 301 investigations.

investment, and ultimately improve its economic performance and national welfare by more closely integrating itself into the global economy through recognizing and enforcing intellectual property rights.¹²⁵ The wielded stick is that a developing country will face aggressive U.S. legal claims if it does not comply with its WTO obligations.¹²⁶

U.S. firms exploit ideas about the benefits of free trade and intellectual property protection to complement threats under Section 301 and WTO procedures. Firms attempt to persuade foreign governments that a change in policy is in the foreign country's self-interest. This technique, coupled with threats under Section 301, was successfully used by the United States to persuade developing countries to sign the TRIPs Agreement. As Susan Sell notes, "it was not merely [U.S. corporate actors'] relative economic power that led to their economic success [with the TRIPs Agreement], but their command of IP expertise, their ideas, their information, and their skills in translating complex issues into political discourse."¹²⁷

Following conclusion of the WTO Agreements, U.S. industry has continued to work with U.S. public officials to "educate" foreign governments about not only legal requirements, but also the economic benefits of complying with WTO obligations. Industry, for example, has successfully lobbied the USTR and Congress to allocate funds for educational efforts abroad, often nominally sponsored by international organizations such as the WTO or, for intellectual property rights, the

¹²⁵See e.g., PhRMA June 1994 Congressional Testimony, *supra* note __ (maintaining that aggressive U.S. pressure on developing countries to enhance pharmaceutical protection, despite their protests, is "benefitting them economically as well, as in terms of quality of their healthcare").

¹²⁶See e.g., *U.S. Threatens Argentina with Complaint under TRIPs Agreement*, 16 INT'L TRADE REP. (BNA) 1712 (October 20, 1999) (recounting PhRMA's urging of the USTR to take action, and the hardline stance that the USTR has taken); *Firms Likely to Urge U.S., EU to File WTO Case Against Bulgaria over TRIPs*, 14 INT'L TRADE REP. (BNA) 1749 (Oct. 15, 1997) (describing private firms' lobbying effort against Bulgaria when it attempted to extend its transition period by being classified as a developing country, and reporting industry representatives' insistence that immediate TRIPs implementation be a requirement for WTO accession).

¹²⁷See Sell, *The Globalization of Intellectual Property Rights*, *supra* note __, at 192. See also *id.*, at 190. Sell, however, also notes that while U.S. private actors successfully pressured U.S. politicians to take up their cause and developing countries to agree to agree to new international regimes for intellectual property protection, developing countries "have resisted implementing and enforcing the new policies." SUSAN SELL, *POWER AND IDEAS: NORTH-SOUTH POLITICS OF INTELLECTUAL PROPERTY AND ANTITRUST* 36 (1998).

World Intellectual Property Organization (WIPO).¹²⁸ The United States has regularly sent representatives from the U.S. pharmaceutical and copyright industries to Geneva as “faculty” to educate developing country representatives about intellectual property matters.¹²⁹ U.S. public-private partnerships exploit ideas that support a firm’s and the United States’ material interests¹³⁰ as complements to their respective legal challenges under Section 301 and the WTO dispute settlement system.

II. Public-Private Partnerships in the EC: Moving Toward a U.S. Model

While there have been rich studies of private-sector lobbying over EC internal legislation and standard-setting,¹³¹ much of the academic literature on EC external trade policy primarily has focused on the relative authority of the European Commission vis-a-vis the member states—that is between a supranational institution and national authorities.¹³² This Article rather addresses the

¹²⁸ Interviews with members of IIPA and PhRMA (May 1999). See also Marney Cheek, *The Limits of Informal Regulatory Cooperation in International Affairs: A Review of the Global Intellectual Property Regime*, 33 *GEORGE WASHINGTON INTERNATIONAL LAW REVIEW* 277, 305-3 (2001) (referring to U.S. “technical assistance programs” to developing countries for the creation of “effective enforcement regimes,” the most common being “the review of draft [developing country] legislation” for the recognition and enforcement of intellectual property rights, sometimes in connection with a country’s efforts toward “joining the WTO”).

¹²⁹ Interviews with members of IIPA and PhRMA (May 1999).

¹³⁰ Most economists believe that the TRIPs Agreement should lead to a net flow of funds to the United States and other developed countries from developing countries. See e.g. Keith Maskus, *Intellectual Property Issues for the New Round*, in *THE WTO AFTER SEATTLE* 137, 142 (Jeffrey Scott ed., 2000) (noting an estimate of “static risk transfers... of some \$5.8 billion per year” to the United States, and “a net outward transfer of around \$1.2 billion per year” for Brazil); and Alan Deardorff, *Should Patent Protection Be Extended to All Developing Countries?* 13 *WORLD ECONOMY* 497, 507 (1990) (“patent protection is almost certain to redistribute welfare away from developing countries”). For a study of the impact of the TRIPs Agreement on India, see, e.g., Jayashree Watal, *Pharmaceutical Patents, Prices and Welfare Losses: Policy Options for India Under the WTO TRIPs Agreement*, 23 *WORLD ECONOMY* 733 (2000) (noting “that prices are likely to increase and welfare likely to decrease” in India).

¹³¹ See, e.g., JUSTIN GREENWOOD, *REPRESENTING INTERESTS IN THE EUROPEAN UNION* (1997); COLLECTIVE ACTION IN THE EUROPEAN UNION: INTERESTS AND THE NEW POLITICS OF ASSOCIABILITY (eds. Justin Greenwood & Mark Aspinwall) (1998); LOBBYING THE EUROPEAN UNION (R.H. Pedler and M.P.C.M. Van Schendelen eds., 1994); ORGANIZED INTERESTS AND THE EUROPEAN COMMUNITY (Justin Greenwood et al., eds., 1992). **UPDATE**

¹³² See Sophie Meunier & Kalypso Nicolaidis, *Who Speaks for Europe? The Selection of Trade Authority in the EU*, 37 *J. COM. MARKET STUDIES* 477 (Sept. 1999); N. Emiliou & D. O’Keefe, *THE EUROPEAN UNION AND WORLD TRADE LAW* (1991); *THE EUROPEAN COMMUNITY’S COMMERCIAL POLICY AFTER 1992: THE LEGAL DIMENSION* (Mark Maresceau ed., 1993); I. Macleod et al. (sp?), *THE EXTERNAL RELATIONS OF THE EUROPEAN*

developing role of the private sector in the EC's bringing of trade claims against third countries. Since the WTO's creation in 1995, the European Commission has increasingly advanced the interests of EC private enterprises before the WTO's dispute settlement system. As in the United States, the Commission's more active role has resulted in mutually advantageous partnerships. Organized commercial interests benefit through potential market expansion and enhanced access and influence over the EC institution responsible for negotiating with foreign governments on trade matters. The Commission benefits through bolstering its effectiveness in litigating trade claims and thereby enhancing its stature both within the EC, among member states and their most powerful commercial constituents, and abroad through its more dynamic leadership role.¹³³ As its USTR counterpart, the Commission is relatively understaffed and depends in part on information provided to it by affected firms and industries.¹³⁴

EC public-private partnerships remain, however, less developed than those in the United States. The EC's more convoluted policy-making process slows the development of EC public-private collaborations. The Commission's trade policy initiatives must be approved by the EC's

COMMUNITIES (1996). Much of this literature addresses the formal competence to negotiate, sign and approve agreements, as opposed to the implementation and enforcement of agreements once signed. This article addresses this latter issue. **UPDATE**

¹³³ Similarly, David Coen argues that "the Commission will continue to develop its relationship with business to reinforce the Commission's position in relation to nation states." David Coen, *The Evolution of the Large Firm as a Political Actor in the European Union*, 4 J. EUR. PUB. POL'Y 104 (1997?). Coen likewise concludes that "the Commission benefits from improved input into the national policy making process, the establishment of a wider constituency of pan-European firms, and greater policy-making legitimacy." *Id.* As for the Commission's enhanced prominence in external relations, Assistant Secretary of Commerce Franklin Vargo has noted that the New Transatlantic Agenda signed between the U.S. and EU in December 1995 "marks the first time that we are dealing with the EU as a political institution on a large scale." *Issues in U.S.-European Union Trade: European Privacy Legislation and Biotechnology/Food Safety Policy Before the House Comm. on International Relations*, (1998) (testimony of Assistant Secretary of Commerce Franklin Vargo), Federal News Service (May 7, 1998). At the core of the NTA lies trade and other economic relations. For an overview of the history of U.S.-EU economic relations since WWII together with recent institutional developments in the transatlantic relationship, see Mark Pollack & Gregory Shaffer, *Transatlantic Governance in Historical and Theoretical Perspective*, in *TRANSATLANTIC GOVERNANCE IN A GLOBAL ECONOMY* (2001).

¹³⁴ As Greenwood notes in respect of the Commission generally, "Taken as a whole, the Commission has become dependent upon specialist input from outside interests. The European Commission is so small that there might be just one official with responsibility for the affairs of an entire business domain. It has therefore become dependent upon input from specialist outside interests, sometimes to the extent that European business interest groups write Commission reports." See Justin Greenwood, *Organized Business and the European Union*, in *ORGANIZED BUSINESS AND THE NEW GLOBAL ORDER* (eds. Justin Greenwood and Henry Jacek) 77, 80 (2000)

fifteen member states, often by consensus. Individual member states may place breaks on the Commission's discretion to take a more proactive role. In addition, most EC firms remain predominantly nation-based. Though the situation is evolving, they traditionally have had less direct contacts with the Commission in Brussels than U.S. firms with the policy-making process in Washington. The Commission, however, is attempting to change this. By facilitating greater input from EC export-oriented commercial interests and more effectively exploiting the WTO dispute settlement system, the Commission hopes raise its profile within the WTO, as well as within the EC itself.

This section begins with an overview of the European Commission's export-oriented "Market Access Strategy" (Part A). It then examines the alternative mechanisms enterprises may use to have EC public officials act on their behalf, in furtherance of the Strategy (Part B). It concludes by evaluating how these mechanisms have been used to date and are evolving toward a U.S. model of public-private partnerships, albeit in a more constrained manner (Part C).

A. Commission Takes the Offensive for EC Firms: The New Market Access Strategy. The EC's trade policy has traditionally been more defensive in posture, reacting to foreign imports and domestic demands for protection on the one hand, and to new trade liberalization proposals advanced by the United States, often to dismantle those EC barriers, on the other. The original proposal for establishing a liberal trade regime under the GATT was driven by the United States, not war-torn Europe. As documented by Kenneth Dam and others, the United States pressed for the development of a more liberal trade regime immediately following World War II to avoid repetition of the protectionist policies of the 1930s that arguably contributed to economic retrenchment and nationalist tensions, leading to the rise of the Nazi party and the century's second "world war".¹³⁵ American leaders believed that liberal economic policies would help rejuvenate Europe and thereby stem communist expansion from the Soviet east.¹³⁶ The United States continued to play a leading

¹³⁵ See Dam, *supra* note ____; Destler, *supra* note ____, at 5-6.

¹³⁶ See Mark Pollack & Gregory Shaffer, *Transatlantic Governance in Historical and Theoretical Perspective*, *supra* note __, at __; Kevin Featherstone and Roy H. Ginsberg, *THE UNITED STATES AND THE EUROPEAN COMMUNITY IN THE 1990'S: PARTNERS IN TRANSITION* (1993); Rene Schwok, *U.S.- EC RELATIONS IN THE POST-*

role in the negotiation of seven successive rounds of multilateral trade negotiations, culminating in the completion of the Uruguay Round and the creation of the World Trade Organization. During the Uruguay Round negotiations, EC negotiators often faced new U.S. proposals to which they could not clearly or rapidly react because they awaited instructions from divided EC member states.¹³⁷ Differences among member states, in particular between the more liberal-oriented states from northern Europe and the more protectionist-oriented members from the south (dubbed the Club Med), resulted in delay and caution, anathema to productive initiatives.¹³⁸

Following the WTO's establishment in January 1995, the United States was quick to employ the WTO's more legalized dispute settlement system, while the EC was again on the defensive. The United States initiated a series of high profile cases against the EC, challenging long-standing, politically sensitive EC barriers to the importation of bananas and beef.¹³⁹ The United States brought eight of the first fourteen WTO complaints resulting in panel decisions, and was the object of only three challenges. The EC, on the other hand, was a defendant in five of the first fourteen cases (three brought by the United States) and was challenger only once (and that, a case also brought by the United States and Japan against Indonesia's national car regime).¹⁴⁰

The European Commission felt under pressure to take an initiative. Its liberal Commissioner for trade policy, Sir Leon Brittan, was anxious to leap. In February 1996, the European Commission

COLD WAR ERA: CONFLICT OR PARTNERSHIP? (1991).

¹³⁷ See e.g., Hugo Paemen and Alexandra Bensch, FROM THE GATT TO THE WTO: THE EUROPEAN COMMUNITY IN THE URUGUAY ROUND (1995).

¹³⁸ See generally Paeman & Bensch, *supra* note __. France, for example, had little confidence in the EC's ability to negotiate on France's behalf in agricultural trade liberalization. See Lionel Barber et al., *U.S. Stands Ground on Farm Pact: Statement as France Renews Threats to Veto GATT Deal*, FIN. TIMES, Sept. 23, 1993, at 26; *Except Us*, ECONOMIST, Oct. 16, 1999 (quoting French Prime Minister Alain Juppé's 1993 statement that, "We do not trust you, Monsieur Brittan, and we will never trust you," addressed to Sir Leon Brittan, the EC trade commissioner and chief trade negotiator).

¹³⁹ See Request for Consultations by Guatemala, Honduras, Mexico and the United States, *European Communities Regime For The Importation, Sale And Distribution Of Bananas*, WT/DS16/1 (Oct. 4, 1995) (stating that the communication for consultation was dated in September 1995); Request for Consultations by the United States, *European Communities - Measures Concerning Meat And Meat Products (Hormones)*, WT/DS26/1 (Jan. 31, 1996).

¹⁴⁰ See *Overview of State of Play WTO Disputes* (updated Jan. 13, 2000) available at <<http://www.wto.org/wto/dispute/bulletein.htm>> (visited Feb. 11, 2000).

did so, announcing a new "Market Access Strategy" whose aim was to make the EC's trade policy more proactively focused on opening foreign markets, rather than on defending the EC's domestic market from foreign goods. The Strategy's essence has been to identify and target foreign barriers to EC imports and press foreign governments to eliminate them. Trade Commissioner Brittan officially announced the Market Access Strategy not before an audience of member state bureaucrats, but rather at a business symposium to which executives from major EC exporting companies were invited. There, he declared a "D-Day for European Trade Policy," promising "We are going onto the offensive, using our trade powers forcefully but legitimately to open new markets around the world."¹⁴¹ These highly publicized remarks marked a sea change from the EC's more prudent, protectionist, inward-looking, reactive trade policy of the past. Europe was again on the conquest for new markets, this time not with guns and war ships, but with electronic data banks and legal briefs.

To implement the Market Access Strategy, the European Commission has attempted to forge better direct working links with EC private enterprises and trade associations. The Commission requires private sector input, especially as regards the detailed facts of a case, if it is to successfully litigate in the WTO's legalized dispute settlement system.¹⁴² These new public-private links permit businesses to bypass their national representatives and forge ongoing relationships with units within the Commission's trade directorate. Although the member states retain a right to authorize or veto Commission actions,¹⁴³ in most matters, Commission representatives become the dominant

¹⁴¹ Directorate General I Press Conference. Full cite

¹⁴² As Tim Jackson of the Scotch Whiskey Association states, "We must therefore be ready to assist the Commission (which sadly does not have unlimited resources to pursue such matters) often at very short notice when a WTO case is under way. For example, during the Japan case we had to commission market research to help the Commission refute some of Japan's initial submission and we are currently assisting the Commission by gathering market information/research for their Korea and Chile cases. . . . It is a 'partnership' exercise with other industry colleagues, respective Governments and the Commission." GCS CITE. Confirmed in interview with member of the Scotch Whiskey Association (May, 1997).

¹⁴³ The Council, comprised of representatives of the fifteen EC member states, reserves the authority to authorize Commission actions pursuant to the Article 113 procedure, and has the authority to veto Commission decisions under the TBR procedure, described below. However, in practice, considerable authority has been delegated to the Commission under both of these procedures, as also described below.

players.¹⁴⁴

Commissioner Brittan established within the trade directorate a new “Market Access Unit” whose primary role was to interact with EC business interests concerning the trade problems they faced. The Unit has created an immense database listing foreign trade barriers by sector and country. The list grew from 350 identified trade barriers in early 1996 to 800 in early 1997 to more than 2,200 in 1998.¹⁴⁵ The Unit estimated that over 90 percent of the identified trade barriers were reported by businesses or their trade associations.¹⁴⁶ Use of the site rose exponentially, from an average of 30,000 contacts per day in early 1996, to 60,000 in early 1997, to more than 150,000 daily contacts in 1998.¹⁴⁷ Over 55 percent of these daily queries came from companies employing fewer than 400 people.¹⁴⁸ Although, the Unit could not precisely track which of the 2,200 trade barriers were referred

¹⁴⁴ Cf. Meunier & Nikolaidis, *Who Speaks for Europe?*, *supra* note _____, at 477 (referring to the European Court of Justice's (ECJ) 1994 opinion over competence and the resurgence of member state control over trade policy). The present article, on the other hand, focuses on day-to-day EC trade policy, in particular relating to trade disputes under WTO rules in which the Commission clearly plays the dominant role, regardless of ECJ decisions and member state negotiations over treaty provisions. *See supra* note ____ and accompanying text.

¹⁴⁵ The Market Access database is available on the Internet at <http://mkacddb.eu.int>. The data was obtained in an interview with Dorian Prince, head of the Market Access Unit, on March 5, 1998, and confirmed in a subsequent interview in June 1999. *See also* Sir Leon Brittan, opening address to the second symposium on the Market Access Strategy, “The EU’s Market Access Strategy: One Year On” (Nov. 4, 1997).

To some, the public nature of the EC database may recall the United States’ use of the “Super 301” and “Special 301” mechanisms under the U.S. trade laws to highlight “priority” foreign trade practices and pressure foreign governments to remove them through threatening economic retaliation. The EC database, however, is not accompanied by the build-up and media hype which surrounds the publication of the “Super 301” and “Special 301” lists once per year. Rather, it is an ongoing compilation of trade barriers which more closely resembles the U.S. Department of Commerce’s “Market Access and Compliance” service (*see* <http://www.mac.doc.gov>). While the Commission notifies the foreign government before adding the trade barrier to its database, and while it may use that opportunity to have the barrier removed, the primary reason for its notice is to ensure the accuracy of the barrier’s description before publication, further investigation and formal reference to the EC’s Member State representatives.

¹⁴⁶ Notification may occur through direct contact with the Market Access Unit or indirectly through a sector-specific or country desk within the Commission, through a member state ministry official, through a member state foreign embassy, or through one of the EU’s 126 foreign missions.

¹⁴⁷ These figures were provided in interviews with Dorian Prince, head of Market Access Unit in the trade directorate (Telephone, March 1998; also discussed in Brussels, June 1999).

¹⁴⁸ Interview with Dorian Prince.

to it electronically, it estimated the number to be in the range of 40 percent.¹⁴⁹

From a cynic's perspective, organizing a database is a perfect project for bureaucrats (or, in this case, that multilingual breed, Eurocrats). It is not policy; it is not a solution to business problems; but it is lots of paper-- over 400,000 pages if you print out the database.¹⁵⁰ The U.S. Department of Commerce similarly created a database, but U.S. firms disparaged it, as have many interviewed in the USTR. Well-organized U.S. businesses that face a trade barrier go straight to those who aggressively negotiate on their behalf, the USTR trade negotiators. For them, computer databases can be left for the preparers of government reports.

Interviewed EC business representatives, on the contrary, speak favorably of the Commission's database. The database serves a purpose in Europe not required in the United States-- it publicizes the Commission's export-oriented strategy and helps forge new links between the private sector and trade directorate that otherwise were under-developed or did not exist. In the United States, businesses already came to the USTR when they faced trade barriers. The Commission lacked this luxury. While the USTR responded to onslaughts of private sector lobbying reinforced by Congressional phone calls and committee grillings, the Commission had to lobby firms to lobby it. Were Brittan's D-Day not to be a British Dunkirk, the Commission had to rally Europe's constituent firms to create the public-private partnerships necessary for trade law's successful application. The Commission hired consultants to provide detailed sectoral reports on trade barriers,¹⁵¹ hosted well-publicized informational fora on trade policy which it urged business executives to attend, distributed glossy brochures and otherwise solicited European businesses to work with it on EC trade matters.

Given the USTR's use of Section 301-- in particular in the heyday of the 1980s-- to muscle foreign countries to import U.S. products, U.S. firms knew that the USTR fought for their export interests. European firms had no such faith. In fact, the trade liberal-oriented countries in Europe, such as Germany, Holland and the UK, opposed the EC's early version of Section 301, the New

¹⁴⁹ *Id.*

¹⁵⁰ Interview with Dorian Prince, *supra* note __ (Brussels, June 1999).

¹⁵¹ *See infra* notes __.

Commercial Policy Instrument (NCPI), and worked to impede its effective implementation. In the early NCPI case brought by the Dutch company AKZO against a controversial United States law barring imports on intellectual property grounds (Section 337 of the 1974 Trade Act), the Dutch government opposed and tried to obstruct the EC's bringing of the GATT case.¹⁵² The Dutch and other export-oriented EC member states feared that permitting private firms to bring NCPI cases could trigger a mercantilist unraveling of the liberal trade regime, not its enforcement.¹⁵³

Brittan's trade directorate, however, radically changed the EC's outlook on the offensive use of the WTO dispute settlement system. Commission units now systematically investigate barriers to EC trading interests. An EC inter-agency group, the Market Access Action Group, consisting of representatives of different *directorate generales*, directorates, units and desks within the Commission, meets weekly to assign responsibility for investigating trade barriers and to prioritize them.¹⁵⁴ In the investigation, the Commission determines whether the trade barrier exists, whether it constitutes a violation of a trade agreement, and the extent of its economic impact on the EC.¹⁵⁵ These investigations have resulted in the Commission requesting more consultations before the WTO dispute settlement body since 1997, than any other WTO member, including the United States. During the first two years of the WTO's existence, the Commission filed only three complaints, compared to nine filed by the United States. From 1997-1999, however, the Commission outpaced the U.S. in bringing new WTO complaints by twelve to seven.¹⁵⁶

¹⁵² Interviews with members of the Brussels trade bar and a former member of the Commission's legal services (June 1999).

¹⁵³ European industries had traditionally solicited the Commission for import protection, not to advance export interests.

¹⁵⁴ The Commission investigation will typically be conducted by the Market Access Unit in an Article 133 proceeding, although other Units of DG1 could take primary responsibility. Safeguards and subsidy cases, for example, will involve the safeguards and subsidy units in the trade directorate. In a TBR case (described below), the Commission's TBR unit conducts the investigation.

¹⁵⁵ Before consulting a foreign government, the Commission, for its own internal purposes, will analyze whether the alleged trade barrier is in violation of a provision of a WTO agreement or of one of the more than 100 bilateral and regional agreements signed by the EC.

¹⁵⁶ See *Overview of State of Play of WTO Disputes*, *supra* note _____. **REVERIFY** In addition, the EC has been more active than any other WTO member in negotiating bilateral free trade agreements. The EC contains a list of these agreements on its Web site at <http://europa.eu.int/comm/trade/pdf/ecrtagr.pdf> (visited May 14, 2001). See also

B. Alternative Tracks for Implementation: Enhancing Business-Commission Coordination.

Private firms have a choice of two internal EC procedures that each may culminate in the EC's initiation of a formal complaint before the WTO's Dispute Settlement Body: the traditional "intergovernmental" Article 133 procedure and the relatively new Trade Barrier Regulation (TBR). As part of its Market Access Strategy, the European Commission has actively promoted business use of the TBR which (as explained below) grants private enterprises rights to have the Commission investigate foreign trade barriers. Although the TBR is gaining acceptance, the Article 133 process nonetheless remains far more commonly used. The EC brought twenty-six of its first twenty-seven WTO complaints via the Article 133 procedure. However, from March 16, 1998 to May 7, 1999 the EC brought one-third (five of sixteen) of its new claims pursuant to the TBR.¹⁵⁷ The increased use of the Trade Barrier Regulation signals a significant shift toward enhanced public-private coordination. This shift has also shaped use of the less transparent Article 133 procedure, as private enterprises also increasingly work with the Commission and member states to rally support for their claims in this reputedly "intergovernmental" process.

1. The Article 133 Process: Inside the Labyrinth. The Article 133 process is a distant relative of the law formally set forth in the EC Treaty. Under Article 133 (originally numbered Article 113)

Gary Yerkey, *Business Execs Call on U.S. to Retake Leadership on Trade, Citing European Gains*, 18 INT'L TRADE REP (BNA) 260-261 (Feb. 15, 2001) (noting number of free-trade pacts the EU has signed since the conclusion of the Uruguay Round).

¹⁵⁷ By January 1999, the percentage of TBR claims as a proportion of all EC claims referred to the WTO Dispute Settlement System had risen to around 20 percent. See presentation by Sir Leon Brittan, *Removing Barriers to Trade: The EU's Market Access Strategy*, speech to the Brussels Chamber of Commerce, Brussels, Jan. 28, 1999. Two of the six WTO complaints brought via the TBR involve the same matter-- U.S. rules of origin for silk products. This matter was provisionally settled by an exchange of letters between Sir Leon Brittan on behalf of the EC and Charlene Barchefsky on behalf of the U.S.. Disagreement over the United States' implementation of the settlement, however, led the EC to file a second complaint before the WTO's dispute settlement body. The EC expects that this latter complaint, concerning the United States's application of the earlier letter agreement, will also be settled. **UPDATE.** The other four referred TBR matters were Japan- Imports of Finished Leather; United States- Anti-Dumping Act of 1916, Argentina- Exports of Hides and Imports of Finished Leather and United States- Licensing of Musical Works. See overview in Jean Charles Van Eeckhaute, *Private Complaints against Foreign Unfair Trade Practices: The EC's Trade Barriers Regulation*, 33 J. OF WORLD TRADE 199, 212 (1999).

of the Treaty,¹⁵⁸ all decisions concerning the implementation of the EC's "common commercial policy" are to be made by the Council, which consists of one representative from each of the fifteen member states, in response to proposals submitted by the European Commission.¹⁵⁹ The Commission, which represents the EC on trade matters vis-à-vis third countries,¹⁶⁰ is to conduct commercial negotiations with other countries and organizations in consultation with a committee of member state representatives, known as the "Article 133 Committee" in reference to the Treaty article.¹⁶¹ However, in practice, the Article 133 Committee has largely deferred implementation of

¹⁵⁸ The provision governing EC authority over trade policy was initially numbered Article 113 of the Treaty Establishing the European Community. The Treaty of Amsterdam, ratified in May 1999, amended this Treaty by adding new provisions and eliminating outdated ones. In the process, the articles of the Treaty were renumbered. Article 113 became Article 133.

¹⁵⁹ In practice, different representatives from the member states meet in the Council, depending on the issue. For foreign trade matters, the Council typically acts through the Foreign Affairs Council, which consists of the foreign affairs ministers of the fifteen member states.

¹⁶⁰ The EC institutions have exclusive competence over matters involving the sale of goods. However, the European Court of Justice's Opinion 1/94 (World Trade Organization) (1994 E.C.R. I-5267, Nov. 15, 1994) held that the member states retain competence over most matters covered by the WTO TRIPs (Trade Related Aspects of Intellectual Property Rights) and GATS (the General Agreement on Trade in Services) agreements. As regards trade in services, the Court held that the EC institutions have exclusive competence only where the provision of the service does not involve any movement of persons or a foreign commercial presence (par. 43-45), or involve an area in which it has achieved complete harmonization internally or has otherwise expressly conferred negotiating powers on Community institutions (par. 95-97). As regards intellectual property rights, the Court held that EC institutions have exclusive competence only as regards the prohibition of "the release into free circulation of counterfeit goods" (par. 55-56), subject again to whether full harmonization is accomplished internally (par. 102-103). In the Treaty of Nice, however, the member states agreed, subject to the Treaty's ratification by all fifteen member states, to modify Article 133 to provide in its paragraph 5 that EC exclusive competence over a common commercial policy "shall also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property," subject to exceptions for "trade in cultural and audiovisual services, educational services, and social and human health services," as well as "agreements in the field of transport." **ADD CITE.**

¹⁶¹ This committee is called the Article 133 Committee because it exists pursuant to Article 133 of the Treaty, which provides as follows:

"...(2) The *Commission shall submit proposals to the Council for implementing* the common commercial policy.

(3) Where agreements with one or more States or international organizations need to be negotiated, the Commission shall make recommendations to the Council, which shall authorize the Commission to open the necessary negotiations. The Commission shall conduct these negotiations in *consultation with a special committee* appointed by the Council to assist the Commission in this task and within the framework of such directives as the Council may issue to it"

(4) In exercising the powers conferred upon it by this Article, the Council shall act by *qualified majority vote....*" (emphasis added).

Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, art. 133(3), 1997 O.J. (C340) 1.

EC trade policy to the Commission, which, in turn, has provided European enterprises with a central contact in Brussels, facilitating the formation of EC public-private partnerships, as explained below.

Although the Council is to make all decisions on external commercial relations under the Treaty, the Council only meets about [once] per month to discuss selected matters of political importance and will rarely discuss matters brought before the Article 133 Committee, in particular in respect of the implementation of trade agreements.¹⁶² The Council thus has delegated most formal decision-making authority over trade matters to the Article 133 Committee.

The Article 133 Committee, which also consists of one representative from each member state, originally was created to “consult” with the European Commission in an advisory capacity about the Commission’s implementation of Council decisions.¹⁶³ The Committee, however, informally exercises its authority. The Committee almost never takes a vote in its meetings, as votes are usually not necessary. Rather, decisions are typically made by consensus. If no member state formally objects, the Chair¹⁶⁴ of the Article 133 meeting simply notes whether sufficient votes are present in support of the measure and, if so, concludes the meeting by confirming the decision

¹⁶² The precise contours of the Commission’s and Council’s respective powers over trade policy remain unclear. Article 133 only refers to the negotiation of trade agreements and not the decision to bring trade claims in implementation of them. The Commission can thus argue that it maintains sole competence to oversee and implement trade agreements once in effect. The Treaty nowhere states this, however, so that the Commission’s authority remains ambiguous. To maintain good relations with the Council, the Commission consequently always obtains approval of the Article 133 Committee before initiating a WTO claim. Moreover, the bringing of a trade claim typically results in a negotiation with a foreign state, either to settle the claim prior to WTO litigation or to implement a WTO panel decision following litigation. Under the Treaty, these negotiations therefore, clearly remain within the Council’s competence. The Commission has, however, filed a third party submission before a WTO panel when this was not supported by a qualified majority of member states. The Commission filed a third party submission in support of Canada’s and Brazil’s claims before WTO panels against each other’s aircraft subsidies, even though member states were divided because suppliers of airline parts from certain member states benefitted from the subsidies, while others were harmed. The submission was, however, an exception and did not comprise the bringing of an independent EC complaint. This information was confirmed in interviews with Commission officials in DG1 and member state representatives to the Article 133 Committee (Brussels, June 1999).

¹⁶³ See *supra* note __.

¹⁶⁴ The Chair of the meeting is a representative of the member state that holds the presidency of the Council at the time. The Presidency of the Council rotates every six months among the fifteen member states. The Presidency in 1999, 2000 and 2001 will have been held respectively, in order, by Germany, Finland, Portugal, France, Sweden and Belgium.

made.¹⁶⁵ The Commission is thereby authorized to proceed with the action that it proposed.

In theory, the Commission must refer a matter to COREPER (the EC's Committee of Permanent Representatives), the body immediately below the Council, if a member state objects.¹⁶⁶ If COREPER were likewise unable to resolve the matter by unanimity, it would, in turn, refer it to the Council, which would then make a decision by a "Qualified Majority Vote," as provided under the Treaty.¹⁶⁷ However, the Article 133 Committee practically never refers trade matters to COREPER.¹⁶⁸ Neither Committee members nor the Commission wish to transfer decision-making authority on trade matters from themselves, who are trade specialists, to the Council, which consists of foreign affairs ministers.¹⁶⁹

The member state trade officials on the Article 133 Committee, in turn, do not play the primary role in implementing EC trade policy, including whether to initiate a WTO complaint. First, not even the highest ranked members of the Article 133 committee, the "titulaires," formally authorize most EC actions, as they only meet once per month in Brussels. Rather, the lower-ranked

¹⁶⁵ Interview with Michael Johnson, a former Article 133 representative from the United Kingdom, now an international trade consultant with Malmgren Golt Kingston & Co. Ltd. in London (March 5, 1998). See also Michael Johnson, *European Community Trade Policy and the Article 113 Committee* (The Royal Institute of Internal Affairs, 1998)[hereinafter Johnson, Article 133 Committee]. The *de facto* authority of the Commission in antidumping decisions, in which the Council typically merely "rubber stamps" Commission decisions is noted in Ostry, *GOVERNMENTS AND CORPORATIONS*, *supra* note __, at 47, citing John-Francois Bellis, *The EEC Antidumping System*, in *ANTIDUMPING LAW AND PRACTICE: A COMPARATIVE APPROACH*, 67-68 (John Jackson & Edwin Vermulst eds., 1989).

¹⁶⁶ The term in French is the *Comite des Representants Permenantes* or COREPER.

¹⁶⁷ Decisions on Article 133 matters are, technically, to be made by the Council by "Qualified Majority Vote" (QMV). See *supra* note __. Under the EC system, votes on decisions to be taken by QMV are weighted per country, so that larger countries such as Germany have more votes than smaller ones. Article 205 of the EC Treaty, as amended, sets forth the number of votes each member state holds on the Council, and the number of votes required to adopt an act by QMV. Sixty-one out of a total of eighty-seven votes are required to pass an act by QMV following a Commission proposal.

¹⁶⁸ In fact, it has referred only one EC complaint before the WTO to COREPER, and that was the politically-charged complaint over the United State's Helms-Burton legislation. Interviews with Commission and member state representatives (Brussels, June 1999).

¹⁶⁹ Foreign affairs representatives sitting on the Council are the member state analogues to the U.S. Secretary of State, while the "titulaires" on the Article 133 Committee are the member state analogues the USTR. However, since most *de facto* authority over the implementation of EC trade policy resides in the Commission, the actual analogue to the USTR is the Trade Directorate Commissioner within the Commission, who, as of September 2001, is Pascal Lamy.

“deputies” meet almost every Friday in Brussels and typically authorize the initiation of WTO proceedings and other EC measures.¹⁷⁰ Second, the deputies typically defer to Commission representatives, who set the agenda for all Article 133 Committee meetings. The deputies only indirectly authorize EC actions, including the filing of a WTO claim, by not opposing a proposal or position paper submitted by the Commission.¹⁷¹

The Commission dominates the EC’s implementation of its trade policy because it has greater expertise in handling the technicalities and increasing demands of WTO law. Only the Commission investigates, defends and challenges trade barriers before the WTO’s Dispute Settlement Body, and thus member state representatives lack the Commission’s knowledge. As trade issues become increasingly numerous and complex, the Commission’s grasp of the underlying facts and specialized understanding of WTO law augment its authority. Member state representatives therefore delegate *de facto* decision-making power to the Commission for the initiation of most WTO complaints.¹⁷² In the words of one member of the Article 133 Committee, they typically defer

¹⁷⁰ The fifteen members of the Article 133 Committee are generally the most senior trade officials in the civil services of each of the fifteen member states. These representatives, referred to as “titulaires,” typically meet in Brussels only once a month (typically the last Friday of the month) unless a special meeting is called on an extraordinary matter. Otherwise, lower-level “deputies” from the member state trade ministries, together with someone from the member state’s permanent mission in Brussels, meet on a weekly basis (typically each Friday in Brussels). The deputies also attend the monthly meeting of the titulaires. All national representatives are in turn assisted by members of the Council’s permanent secretariat in Brussels, who provide administrative assistance for all Article 133 committee meetings. The Council secretariat, for example, circulates the agenda for all meetings.

¹⁷¹ The Commission’s authority is bolstered because the Article 133 Committee’s decisions are based on its position papers and written proposals. The Council secretariat assigned to the Article 133 Committee circulates the agenda for all Committee meetings. Most agenda matters are referred to it by Commission officials, although Member State representatives also refer some matters. The agenda shown to me while in Brussels, for example, contained one matter referred by a member state and twelve by the Commission. I was informed that this was representative of a typical Article 133 Committee agenda.

As another example of Commission predominance in the process, a Commission official showed me in Brussels a Circular in which the Council expressed its support of the Commission’s Market Access Strategy, noting the results to date. The Circular was, however, initiated and drafted by a Commission official seeking formal ratification by the Council of the Market Access Unit’s work. When presented to a member state representative, he merely confirmed that the Circular went by his desk and that he believed that he had skimmed it. His role had been reduced in many cases to merely monitoring the Commission’s multiple endeavors.

¹⁷² The Commission investigation, briefly described above under the heading “The EU’s Market Access Strategy,” permits the Commission to have more detailed knowledge of the impact of the trade barrier in question. The Commission officials’ grasp of the underlying facts enhances their authority in discussions with the member state representatives on the Article 133 Committee.

to the Commission as “the professor.”¹⁷³ Where necessary, the Commission works behind-the-scenes with member state representatives to forge consensus on a matter before formally presenting it to the Committee. Failing consensus, the Commission attempts to ensure that its recommendation is supported by at least a “qualified majority” of member states, in which case, the matter typically still is not referred to COREPER or the Council, for the institutional reasons noted above. Thus, as one Commission official noted, “eventually, we get them.”¹⁷⁴

Many member state representatives, especially those from more liberal-oriented northern states, do not mind “being gotten” by the Commission. They realize that delay and irresolution hamper EC trade policy, especially vis-a-vis the United States. As one member of the Article 133 Committee stated, “EC trade policy works by permission of the French.”¹⁷⁵ That is, if other member states interfere too much with the Commission’s work, the “French win” because the Commission’s initiatives toward trade liberalization are slowed.¹⁷⁶ Even the French representative to the Article 133 Committee confirmed that the French did not object to the current *de facto* delegation of decision-making to the Commission for the bringing of trade claims, provided that the Commission is successful.¹⁷⁷

In the context of trade policy’s increasing demands, technological advances have further promoted this *de facto* delegation of authority. Most trade issues are no longer even mentioned at the weekly Article 133 Committee meeting. Rather, the Commission and member states have developed a flexible operating procedure through electronic communications.¹⁷⁸ On a weekly basis,

¹⁷³ Interview with a member state representative to the 133 committee who used the term “professor.” Representatives from other member states subsequently confirmed this. (Brussels, June 1999).

¹⁷⁴ Interview with Commission official in DG1 (Brussels, June 1999).

¹⁷⁵ Interview with member state representative to Article 133 Committee (Brussels, June 1999).

¹⁷⁶ *Id.*

¹⁷⁷ The French are, however, more circumspect regarding the Commission’s negotiating authority. For example, they immediately opposed Commissioner Brittan’s proposal for the creation of a New Transatlantic Marketplace, or North Atlantic Free Trade Area. Brittan eventually had to abandon this proposal, resulting in the much vaguer Transatlantic Economic Partnership. See discussion in Neil Buckley, *Brittan Bid To Revive Plan For US Partnership*, FIN. TIMES, Sept. 15, 1998, at 5.

¹⁷⁸ Prince interview, *supra* note __.

the Commission's market access unit provides the Article 133 Committee with a list of twenty-five to thirty trade barriers. It transmits this list by electronic mail to the Committee's member state representatives in their home capitals, together with proposals for action to be taken, be it the initiation of consultations with a foreign government or the filing of a formal WTO complaint.¹⁷⁹ On all trade matters that do not involve a formal WTO complaint, the Article 133 Committee is deemed to have automatically adopted the Commission's proposal unless a member state representative objects. The Commission thereby obtains implicit authorization to consult with foreign governments over trade barriers in most matters. Likewise, if a settlement is negotiated with a foreign government that does not entail a modification of an EC regulation, the Commission includes the proposed settlement in its electronic message, which is deemed authorized unless a member state refers it to the weekly meeting. Member state representatives typically refer only a few items for discussion at the weekly meeting.

Because the Commission's *de facto* powers have increased, European businesses can work more efficiently with a central contact in Brussels on international trade matters. Businesses thereby may play more active roles despite the reputation of the Article 133 process as an "intergovernmental" procedure, and despite the fact that Article 133 meetings take place behind closed doors without private parties present.¹⁸⁰ Guided by a Commission representative, sophisticated businesses can ensure sufficient support within the Article 133 Committee prior to the Commission's submission of a proposal. Where needed, they can coordinate positions with businesses in other states so that each respectively contacts its member state representative for endorsement.¹⁸¹ If a matter is raised at an Article 133 Committee meeting, the meeting may merely

¹⁷⁹As the Commission works through its new database, the number of weekly referrals could decrease. The majority of these referrals are trade barriers that do not involve violations of WTO rules by WTO members. They will be the subject of future bilateral, regional and multilateral negotiations, as opposed to the filing of WTO complaints.

¹⁸⁰ As Christopher Boyd, Senior Vice President of Environment and Government Affairs of Lafarge SA, a global manufacturer of construction products, such as cement, confirms in an interview, "What is government affairs? It is the three I's"—that is, "information," "image" and "influence." See *Powers of Persuasion*, *supra* note ____.

¹⁸¹ The Scotch Whiskey Association, for example, worked with other members of the Confederation of European Spirits Producers to support the EC's bringing of the Japan-Alcohol case. Tim Jackson of the SWA confirms that this "involved preparing, researching and communicating our case effectively on a persistent basis,

formally ratify a decision that has already been made. For example, although the UK's Scotch Whiskey Association played the leading role in the Japan, Korea and Chile alcohol cases,¹⁸² it also worked with the European-wide trade association CEPS (the Confederation of European Producers of Spirits) and CEPS's constituent members. These included French cognac producers who contacted French representatives. While some member states "raised their eyes" at the number of EC cases brought in support of the UK spirits industry,¹⁸³ the cases nonetheless went forward.

Article 133 of the EC Treaty operates not as it reads and not as most scholars have written. EC member states have permitted successive delegations of decision-making authority over most trade matters. First the Council (via COREPER) has delegated decision-making to the Article 133 "special committee." The Article 133 Committee has in turn delegated *de facto* powers to the European Commission. These delegations of authority facilitate greater business input in EC decisions over trade disputes. Businesses can now work behind-the-scenes with EC officials to more effectively challenge foreign barriers to their exports. The WTO's trade-liberalizing rules and the Commission's Market Access Strategy provide the incentives. As European businesses learn to profit from the WTO dispute settlement system, they increasingly attempt to use this reputedly "intergovernmental" EC mechanism.

2. The Trade Barrier Regulation: Europe's Reply to U.S. Section 301. European businesses have a more direct track to solicit Commission representation of their interests-- the Trade Barrier Regulation (TBR), enacted in December 1994 in anticipation of the WTO's formation.¹⁸⁴ The TBR

for a very long period of time, to our respective Governments and to the Commission." SWA Remarks, *supra* note__.

¹⁸² See Report of the Panel, *Chile—Taxes On Alcoholic Beverages*, WT/DS87/R, WT/DS110/R (June 15, 1999); Report of the Panel, *Japan—Taxes On Alcoholic Beverages*, (July 11, 1986) WT/DS10/R, WT/DS11/R; Report of the Panel, *Korea—Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R (Sept. 17, 1998); see also *U.S., Europe, Canada Protest Delays In Amending Japan's Liquor Tax Structure*, 13 Int'l Trade Rep. (BNA) 1814 (Nov. 27, 1996) (citing the Scotch Whiskey Association's direct negotiations with [Japanese] politicians and government officials).

¹⁸³ The quote is from a member of the Article 133 Committee. Interview in Brussels (June 1999).

¹⁸⁴ The Trade Barrier Regulation's formal name is Council Regulation (EC) No 3286/94 of 22 December 1994 (laying down Community procedures in the field of the common commercial policy in order to ensure the exercise

grants individual private enterprises legal rights to petition the European Commission to investigate trade matters and bring trade claims on their behalf.¹⁸⁵ The TBR replaced an earlier analogous regulation that European businesses largely ignored-- the New Commercial Policy Instrument (NCPI). The Council enacted the NCPI in 1984 in response to measures taken by the United States under U.S. Section 301 against EC steel and agricultural interests. The French government, in particular, promoted the NCPI to create a counterpart to U.S. Section 301.¹⁸⁶ European businesses were not enticed. They filed only seven NCPI petitions during its ten-year history. Moreover, the Commission rejected two of the seven petitions on the grounds that the complainant failed to present sufficient evidence of an "illicit commercial practice."¹⁸⁷ Member states interfered with others.¹⁸⁸

Because the NCPI was ineffective, the French pressed for a new regulation with more flexible procedural requirements. Northern liberal-oriented member states, such as Germany, again objected, fearing that the regulations would be used for protectionist purposes. The Trade Barrier Regulation was nonetheless enacted as part of an EC package deal pursuant to which the French supported signature of the Uruguay Round Agreements, including the Agreement on Agriculture, in return for passage of the TBR and guaranteed EC support of French agriculture.¹⁸⁹ Since its inception, the Commission has only deployed TBR offensively to challenge foreign trade barriers, and not defensively in protection of the EC's internal market. For this reason, as well as the greater

of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization).

¹⁸⁵ See Article 4 of the TBR. The former NCPI only created rights to submit complaints "on behalf of a Community industry."

¹⁸⁶ See Marco C.E.J. Bronckers, *Private Response to Foreign Unfair Trade Practices- United States and EC Complaint Procedures*, NW. J. INT'L L. & BUS. 651, 719 (1984). Confirmed in interviews in Brussels (June 1999).

¹⁸⁷ The two rejected complaints were respectively made by FEDIOL (the European Seed Crushers' and Oil Processors' Federation) in 1989 (re Argentinian export restrictions on soya beans) and by SmithKline and French Laboratories Ltd. in 1991 (re Jordan's allegedly insufficient patent protection).

¹⁸⁸ See *supra* note ____ and accompanying text.

¹⁸⁹ See Youri Devuyt, *The European Union and the Conclusion of the Uruguay Round*, in Rhodes, Carolyn and Mazey, Sonia (eds.), *THE STATE OF THE EUROPEAN UNION, VOL. 3, BUILDING A POLITY?* (1995), pp. 449-467 (also noting the use of sectoral side-payments to the Portuguese textile industry to secure the assent of a reticent Portuguese government for the conclusion of the Uruguay Round).

acceptability among WTO members of resort to WTO litigation, all EC member states now support the TBR's application.¹⁹⁰

Unlike the former NCPI, the Trade Barrier Regulation permits individual businesses to petition the European Commission to initiate a WTO complaint, and does not require the support of an entire EC industry.¹⁹¹ Legally, the TBR grants a business the right to force the Commission to act. In practice, however, just as in the case of U.S. Section 301 proceedings, businesses ultimately depend on the Commission to represent their case. They thus collaborate with the Commission in applying the regulation, forming *ad hoc* public-private partnerships as in the United States. Businesses choose which mechanism to use-- TBR or the Article 133 route-- in consultation with, and in response to, the advice of the Commission.

Businesses sometimes defer entirely to the Commission as to whether to proceed via the TBR or Article 133 process. For example, while the Italian silk federation, FEDERTESSILE, formally filed an early TBR complaint against the United States' application of rules of origin to Italian silk products,¹⁹² FEDERTESSILE had not even heard of the TBR until the Commission, in search of

¹⁹⁰ Interviews with member state representatives to the Article 133 committee from Germany and the UK, as well as with members of the Commission's TBR unit (Brussels, June 1999).

¹⁹¹ The TBR eases, in particular, standing requirements and requirements to prove "injury." Under the NCPI, an enterprise had to demonstrate that it was acting "on behalf of a Community industry" in order to lodge a complaint. Under the TBR, an enterprise may now lodge a complaint on its own behalf. *See* Council Regulation 3286/94 of 22 December 1994 Laying down Community Procedures in the Field of the Common Commercial Policy in Order to Ensure the Exercise of the Community's Rights under International Trade Rules, in Particular Those Established under the Auspices of the World Trade Organization, art. 4, 1994 O.J. (L349) 71. The injury requirement has also been relaxed under the TBR to that of a "*material impact on . . . a sector or economic activity . . . of the Community or a region*" (emphasis added). This is in contrast to the NCPI requirement to prove "injury" to a "Community industry." Council Regulation 2641/84 of 17 September 1984 on the Strengthening of the Common Commercial Policy with Regard in Particular to Protection Against Illicit Commercial Practices, art. 2.3, 1984 O.J. (L252) 1.

¹⁹² The Italian silk products were being labeled as products from China, where the fabrics were woven, and not from Italy, where they were dyed and finished. The "made in China" label both undermined the fabrics' quality claims as Italian high-fashion products and subjected them to quantitative quotas applied to Chinese textiles. *See* Commission Decision of Feb. 18, 1997 on the initiation of international consultation and dispute settlement procedure. 1997 O.J. (L 62) 43. The U.S. was requiring the products to be labeled "made in China" on the grounds that the finishing work conducted in Italy was insufficient for them to be labeled "made in Italy" (in legal terms, the test is whether the products have undergone a "substantial transformation," the U.S. ruling that they had not). Such a labeling did not bode well for selling the silk products at luxury goods prices in the U.S. market.

successful test cases, approached it.¹⁹³ FEDERTESSILE was represented by no outside or in-house counsel. Rather, it was entirely dependent on the Commission to prepare its complaint and lead it through the TBR procedure. It supplied the Commission with all relevant factual information for purposes of the Commission's investigation, the WTO filing, consultations and ultimate settlement with the United States. The public-private partnership, formed at the Commission's instigation, was a success for both parties. U.S. rules of origin were modified to the Italian silk industry's satisfaction.¹⁹⁴ The Italian silk industry sung the Commission's praises. The Commission, in turn, touted the silk case as a great success. It now could better promote business use of the Trade Barrier Regulation.¹⁹⁵

Although the Trade Barrier Regulation grants enterprises legal rights to force the Commission to act on their behalf, private firms realize that antagonism is self-defeating.¹⁹⁶ Businesses ultimately depend on Commission officials to represent their interests before foreign governments and WTO panels. The Commission, in turn, wishes to satisfy European businesses so that they support Commission trade powers within their respective member states. Members of the TBR unit refer to businesses as "their customers," customers that, as any good entrepreneur, they

¹⁹³ Telephone interview with Mr. Tettamanti, a representative of FEDERTESSILE based outside of Milan, Italy (February 19, 1998).

¹⁹⁴ Days before formal WTO consultations were scheduled to commence, the United States agreed with the EC to modify its application of its rules of origin. *See U.S. and EU Reach Framework for Settling Rule of Origin Spat*, 14 Int'l Trade Rep. (BNA) 1275, July 23, 1997. However, the industry subsequently challenged the United State's implementation of the settlement, leading to the filing of a new EC complaint against the U.S. before the WTO on November 19, 1998. *See Daniel Pruzin and Rossella Brevetti, EU Again Seeks WTO Consultations over U.S. Rules of Origin for Textiles*, 15 Int'l Trade Rep. (BNA) 1999, Dec. 2, 1998. This dispute was also settled to the industry's satisfaction through passage of the Miscellaneous Trade and Technical Corrections Act of 1999, Pub. L. No. 106-36 § 2423 (1999). *See Paula L. Green, Label Rules Relaxed for Importers of Silk*, J. COM., Sept. 24, 1999, at 12;

¹⁹⁵ Michael Smith, *US Accepts EU's 'Made in Europe' Label*, Fin. Times, August, 8, 1997, at 6 ("The Commission said it was optimistic about other cases in the TBR system.").

¹⁹⁶ There have been no challenges to Commission decisions under the TBR. [verify]. There was, however, one formal challenge to the Commission under the New Commercial Policy Instrument, the predecessor to the TBR. In that case, the European Court of Justice held that a claim was admissible which challenged the Commission's refusal to take action pursuant to the NCPI against Argentinian trade practices. The Court, however, held against the plaintiff on the grounds that the Argentinian practices did not violate GATT. *See Federation de l'Industrie de l'Huilerie de la CEE (FEDIOL) v Commission*, Case 70/87 (1989), ECR 1781.

seek out.¹⁹⁷ TBR thus becomes a conduit that helps link the public and the private. It becomes a vehicle to encourage public-private collaborations and thereby successfully exploit the WTO dispute settlement system. To be effective, private businesses and Commission officials must collaborate in pursuit of reciprocal interests.

3. Differences between the Trade Barrier Regulation and U.S. Section 301: Shrinking in Practice. Many legal commentators have compared Trade Barrier Regulation and its predecessor (the NCPI) to U.S. Section 301,¹⁹⁸ typically maintaining that the TBR is primarily symbolic and not nearly as powerful of an instrument.¹⁹⁹ Commentators have pointed to two primary limitations of the TBR that potentially constrain its effectiveness vis-a-vis that of Section 301: (i) TBR's narrower scope; and (ii) TBR's weaker enforcement measures. However, both these criteria are of less importance given the manner in which TBR has been deployed in practice in the context of a more binding WTO system. The increased number of TBR filings during the late 1990s, leading to market-opening outcomes, undermines these unfavorable evaluations.

First, commentators cite U.S. Section 301 for its broader scope. U.S. Section 301 formally has a broader scope of coverage since it addresses not only all WTO matters, including new WTO issues such as intellectual property protection and trade in services, but also such non-WTO issues as the protection of investor and labor rights.²⁰⁰ The TBR, on its face, should not even cover all WTO rights, much less any non-WTO rights. In its Opinion 1/94, the European Court of Justice held that EC member states (and thus not the Commission under the TBR) retained exclusive competence

¹⁹⁷ When I called a member of the TBR unit and mentioned that I had just set up an interview with a representative from COTANCE, the leather trade association in Brussels that has filed two TBR complaints, he replied, "Oh, so you are talking to one of our customers." (Brussels, June 21, 1999).

¹⁹⁸ See Brockner, *supra* note ____; Petros C. Mavroidis and Werner Zdouc, *Legal Means to Protect Private Parties' Interests in the WTO*, 1 J. INT'L ECON. L. 407 (1998); Elisabeth Zoller, *Remedies for Unfair Trade: European and United States Views*, 18 CORNELL INT'L L.J. 227.

¹⁹⁹ In a telephone interview with the author, Michael Johnson, a former UK representative to the Article 133 Committee, referred to the TBR as "mere window dressing," affirming that the Article 133 process is the only one that matters in the EC. Interview in February 1998. For this reason, Mr Johnson focused on the Article 133 process alone in his monograph. See Johnson, *Article 133 Committee*, *supra* note ____.

²⁰⁰ See *infra* note ____.

over most intellectual property and services matters under the TRIPS and GATS agreements.²⁰¹ Legally, the TBR therefore should not apply to them, although this legal situation will change once the Treaty of Nice amendments to the EC Treaty are ratified by the member states.²⁰²

In practice, however, the Commission's TBR unit already has applied the Court's Opinion 1/94 so broadly that almost all intellectual property claims are subsumed. The Commission's TBR unit maintains that all intellectual property claims are covered by the TBR when the violation of an intellectual property agreement "has an impact on trade in goods,"²⁰³ thereby absorbing most intellectual property matters. Four of the first thirteen TBR complaints involved intellectual property issues, in reflection of the importance of intellectual property claims to European industry, even though these claims arguably should lie outside of the Commission's competence.²⁰⁴ The TBR claim

²⁰¹ See *supra* note ____.

²⁰² Article 2 of the TBR defines the term "services" as "those services in respect of which international agreements can be concluded by the Community on the basis of Article 113 of the Treaty." This is an implicit reference to an incorporation of the Court of Justices' Opinion 1/94 concerning EC competence on trade matters. Although the TBR makes no mention of intellectual property rights, the Court's ruling on competence in this area automatically applies. In his remarks on the draft TBR when it was being considered for passage, Commissioner Brittan confirmed that "the respective competences of the Commission and the Council concerning the use of the NCPI will be in line with the recent opinion of the European Court of Justice." *Extract of a Speech by Sir Leon Brittan*, Commission Press Release IP: 94-1125, Rapid (Nov. 30, 1994). Brittan stated that the TBR's scope would be "restricted to: (a) areas of exclusive Community competence (trade in goods and in services not implying movement of persons), and (b) individual issues falling within the Community's competence in the areas of shared competence." *Id.*

²⁰³ See the Commission's Guide to the Community's Trade Barrier Regulation: Opening New Trade Opportunities for European Business. **GCS need proper cite**

²⁰⁴ The four cases are (i) a claim by French cognac producers against Brazil concerning lack of protection of their "appellation d'origin" (geographic indication rights),

(ii) a claim by an Irish copyright association, the Irish Music Rights Organization, against a section of the U.S. Copyright Act which exempts shops, bars, restaurants and similar public places from having to pay royalties to performing rights organizations,

(iii) a claim by the Consortium of 201 producers of Prosciutto di Parma (the raw ham from the Parma district in Italy) concerning Canada's failure to recognize and enforce protection of the geographical indication and trademark of Prosciutto di Parma, and

(iv) a claim filed by the pharmaceutical industry against Korea's patent protection system.

In addition, the TBR is also administering a fifth claim involving intellectual property rights, one that was originally filed under the TBR's statutory predecessor, the New Commercial Policy Instrument. The International Federation of the Phonographic Industry (IFPI) filed a claim against Thailand in 1991 concerning the enforcement of copyright protection. Thailand adopted copyright legislation in 1995, the implementation of which is under surveillance by IFPI, as well as the Commission's TBR unit. See Van Eeckhaute, *Private Complaints against Foreign Trade Barriers*, *supra* note , at 211.

against U.S. copyright law did not even affect trade in goods, since it only involved the cross-border payment of music royalties. Yet the Commission's TBR Unit derived another rationale for its competence, maintaining that the royalties claim fell within the Commission's powers because it involved a cross-border "licensing service" that did not implicate a movement of persons.²⁰⁵ The Commission proceeded with the TBR complaint on these grounds and no member state challenged it before the Court of Justice because it was not in any member state's interest to do so, especially if it did not wish to upset Europe's intellectual property industry. The law in the books remained on the shelf.

Commentators also note that Section 301 provides for more effective coercion since it authorizes the USTR to implement unilateral measures in retaliation against foreign trade barriers, even where no international legal obligation has been violated.²⁰⁶ Under TBR, on the contrary, a complainant may only submit a petition where there is a "right of action established under international trade rules."²⁰⁷ Where the Commission determines that a WTO violation has occurred, the TBR further requires the Commission to submit the EC claim before the relevant international tribunal (i.e. before the WTO),²⁰⁸ so that the EC cannot retaliate unilaterally. The USTR's initiation of a Section 301 proceeding thus historically posed a greater threat to a foreign government.

The WTO's binding dispute settlement system, however, has constrained the United States' unilateral use of Section 301,²⁰⁹ and concomitantly enhanced the EC's threat of an international trade

²⁰⁵ See Notice of initiation of an examination procedure concerning an obstacle to trade, within the meaning of Council Regulation (EC) No 3286/94, consisting of trade practices maintained by the United States of America in relation to cross-border licensing, par. 3, Official Journal, 97/C 177/03, Nov. 6, 1997. Under ECJ Opinion 1/94, claims over services that do not require a movement of persons fall within the Community's trade powers. See *supra* note ____.

²⁰⁶ See *infra* note ____.

²⁰⁷ Article 4 of TBR. Article 2 defines "international trade rules" as "primarily those established under the auspices of the WTO and laid down in the Annexes to the WTO Agreement, but they can also be those laid down in any other agreement to which the Community is a party and which sets out rules applicable to trade between the Community and third countries."

²⁰⁸ See Article 12.2. of TBR.

²⁰⁹ See *supra* note ____.

action.²¹⁰ The EC thus has greater leverage in threatening to bring an international trade claim than it had in the past, so that foreign parties are more likely to settle a claim after a TBR complaint is brought. Although the Commission commenced no TBR cases during the first year and nine months of the TBR's existence, since October 1996 the Commission has commenced [fourteen] investigations, twice the number brought under the NCPI over ten years.²¹¹ In 1999, the Commission filed six WTO complaints resulting from TBR investigations, comparable to the number of claims filed under U.S. Section 301 in an active year.²¹² Through December 1999, the EC had already settled three TBR complaints without having to litigate them before a WTO panel.²¹³ [The

²¹⁰ A defending party, for example, can no longer block the formation of a trade panel or the recognition and enforcement of the panel's decision. See Bhala and Kennedy, *World Trade Law*, *supra* note __, at 38..

²¹¹ The fourteen TBR complaints are: *US-Rules of Origin for Textile and Apparel Products*, O.J. C351/6 (1996); *US- Failure to Repeal the Antidumping Act of 1916*, O.J. C58/14 (1997); *Argentina- Export and Import Restrictions on Raw Hides, Skins and Finished Leather*, O.J. C59/6 (1997); *Brazil- Restrictions on the Sale of Cognac*, O.J. C103/3 (1997); *Japan- Restrictive Practices in the Leather Sector*, O.J. C110/2 (1997); *US- Cross-Border Licensing Rights for Music*, O.J. C177/5 (1997); *Brazil- Import Licensing Requirements for Steel Plates*, O.J. C197-2 (1997); *Brazil- Restrictions in Relation to Trade in Textile Products*, O.J. C63/2 (1998); *Korea- Measures Affecting the Import, Distribution and Advertising of Cosmetic Products*, O.J. C154/12 (1998); *Chile-Restrictions in Relation to the Transit and Transshipment of Swordfish*, O.J. C215/2 (1998); *Brazil-Restrictions on Sorbitol*, O.J. C361/13 (1998); *Brazil- PROEX Export Financing Programme*, O.J. C108/33 (1999); *Canada- Restrictions on Imports of Parma Ham*, O.J. C176/6 (1999); and *Korea- Measures Restricting Trade in Pharmaceutical Products*, O.J. C218/3 (1999).

Eleven of the first fourteen TBR claims involved practices in countries in North and South America: three against the United States, four against Brazil and one each against Argentina and Chile.

²¹² The six complaints are (i) a complaint by the EC iron and steel trade association (EUROFER) over the United States' Antidumping Act of 1916, (ii) a complaint by the Irish Rights Music Organization against the U.S. copyright law, (iii) two complaints by the Italian silk producers against U.S. rules of origin rules, the second one following a dispute over the implementation of an the settlement of the first, (iv) a complaint by the EC leather trade association (COTANCE) against Argentinian export restrictions, and (v) a second complaint by COTANCE against Japanese market access barriers. The complaint against the U.S. Antidumping Act of 1916 alleges that the Act violates GATT's national treatment clause (Article III of GATT). The complaint against Argentina alleges that the restrictions violate Article XI of GATT 1994. The challenged Japanese practices include alleged illegal quotas, subsidies and restrictive business practices. From __ to __, five of the EC's sixteen WTO claims were brought under the TBR procedure.

²¹³ The three cases were the *USA- Rules of Origin for Textile Products*, *Brazil Import Licensing for Steel Products* and *Thailand- Piracy of Sound Recordings*. See Van Eeckhaute, *Private Complaints against Unfair Trade Practices*, *supra* note __, at 210, 212 (concerning the U.S. and Thai cases) and Robert Maclean, *The European Community's Trade Barrier Regulation Takes Shape: Is it Living Up to Expectations?*, *J. World Trade L.*, 69, 91 (1999) (concerning the Brazilian case).

Similarly, Tim Jackson, head of the Scotch Whiskey Association, confirmed at a conference in Geneva in June 1997, "Bilateral pressure can be effective and is a natural first step in registering disapproval with a foreign government- a good example is Korea where following such continued pressure from the Commission (and our

Commission's TBR unit also has reported that a number of satisfactory settlements were under way.^{214]} In short, the differences between TBR and Section 301 have become more formal than substantive.

C. EC Trade Claims in Action: Use of the Article 133 and TBR Tracks To Date. Enterprises in the EC face a maze of national and EC supranational councils, committees, *directorates generales*, directorates, units and sectoral and country desks when they ask public officials to act on their behalf. Enterprises typically rely on someone within the European Commission, possibly in conjunction with a national authority, to guide them through the maze.²¹⁵

There are certain aspects of the TBR procedure vis-a-vis the Article 133 process that firms may consider. First, the different voting rules under the TBR can enhance the leverage of Commission-business partnerships vis-a-vis member states. Under the TBR, the Commission's decision to file a WTO complaint can only be overturned by a qualified majority vote of the Council, whereas a Commission proposal under Article 133 requires qualified majority approval. This makes it extremely difficult for member states to veto a Commission proposal under the TBR.²¹⁶ Member

Government) the Korean Government significantly reduced the discrimination against imported spirits- as a result a \$20 million ECU market has grown to one in excess of \$120 million ECU in the space of 10 years. Discrimination still exists but encouragingly last month the EU Member States agreed to request WTO consultations with Korea about the outstanding discrimination." SWA Remarks (May 1997) *supra* note __. The EC subsequently won the case. *See supra* note __.

²¹⁴ Jean Charles Van Eeckhaute, an administrator in the TBR unit, reports that "mutually agreeable solutions are currently being finalised in *Korea- Imports of Cosmetic Products*, *Brazil- Import Regime for Textile Products and Brazil- Cognac Appellation of Origin*," and that "discussions are under way in *Chile- Transshipment of Swordfish* and will soon start in *Brazil- Import Regime for Sobitol and CMC*." Van Eeckhaute, *Private Complaints against Unfair Trade Practices*, *supra* note __, at 210. *C.f.* Maclean, *The European Community's TBR*, *supra* note __, at 91-92 (Maclean is more pessimistic than the Commission, claiming that "the prospects for negotiated settlement for TBR cases have deteriorated rapidly). The EC subsequently requested the formation of a WTO panel in the Chilean swordfish case. See "EU Requests Swordfish Panel Against Chile, 9 Bridges (Nov.-Dec. 2000), published by the International Centre for Trade and Sustainable Development.

²¹⁵ Unlike the Washington, D.C. trade bar, the Brussels trade bar has played a minor role in assisting firms to challenge foreign trade barriers, even though it has a substantial antidumping practice. The reasons for this are explored in Part III below.

²¹⁶ The greater discretion granted to the Commission under TBR voting rules was used advantageously by the German company Dormier in challenging Brazilian subsidies to one of its competitors, PROEX. Dormier had been unsuccessful in obtaining the Article 133 committee's authorization for the Commission to bring a WTO complaint,

states thus tend to assign lower-ranked officials to the TBR committee (the Article 133 Committee's counterpart for TBR matters). Member state representatives find TBR committee work less exciting than Article 133 Committee work because it is even more "technical," involving fact-intensive litigation files on proposed WTO claims, often of relatively little economic impact. For them, the files comprise too many facts, too much law, and not enough policy or diplomacy. This is a province for lower-level lawyers, not the high politics of diplomatic encounter. The Commission and private complainants thus are granted even more discretion to develop TBR cases and determine negotiation and litigation strategies. Even though the Article 133 process typically works fluidly, the more Commission-friendly rules and procedures under the TBR can, in some cases, influence a firm's expectations and behavior.

Second, TBR may offer some advantages to smaller enterprises with relatively less important commercial claims.²¹⁷ TBR grants enterprises the legal right to have the European Commission investigate an issue on their behalf, provide them with all non-confidential information available, conduct a hearing at which arguments may be presented, and publish the relevant decision in the EC's *Official Journal*.²¹⁸ TBR also prescribes a timetable for the investigation, so that the enterprise

because suppliers to the Brazilian company that benefitted from the subsidies were located in a number of member states. These states refused to support the initiation of such a complaint. However, these states were unable to block the initiation of a TBR investigation. See description in Van Eeckhaute, *Private Complaints against Foreign Unfair Trade Practices*, *supra* note ____ at 211.

²¹⁷ Telephone interview with a member of TBR Unit (February 1998). For instance, in the Italian silk case, the silk producers were not supported by EUROTEx, the Europe-wide textile trade association, because some of EUROTEx's members would benefit from more stringent U.S. rules of origin. In particular, European weavers would benefit from more stringent U.S. rules of origin requiring more production processes to be completed in Europe in order for the end products to be labeled from a European country as opposed to China. Yet the Italian silk producers were nonetheless able to prevail through use of the TBR mechanism. Similarly, a TBR claim brought by the Irish Music Rights Organization involves not only a relatively minor amount of royalties but also an organization based on the periphery of the EC. IMRO, however, was supported by copyright interests throughout the EC.

²¹⁸ This decision is subject to review by the European Court of Justice. The legalistic nature and greater "transparency" of the TBR process, as compared to the Article 133 process, explains why more has been written on it than on the Article 133 procedure, even though the 133 procedure is used far more often. While practicing EC lawyers have written a number of articles on the NCPI and the TBR, they have written nothing on the Article 133 process. Even so, EC lawyers remain much less involved in the TBR process than U.S. lawyers in Section 301 proceedings. See *infra* notes ____.

will be certain that a decision is made within a given time period.²¹⁹ Because the TBR unit of the Commission is relatively more autonomous from member state control, it is less likely to balance a small enterprise's problems against other member state political interests.²²⁰ Claims thus can proceed under the TBR when they otherwise might lack member state support. Business associations generally maintain that the TBR unit, which has actively sought recognition for acting on behalf of Community enterprises,²²¹ is more responsive to their trade concerns than members of the Article 133 Committee and other divisions within the Commission.²²² Thus, smaller, less politically-connected enterprises, or enterprises with weaker or less urgent claims, may more likely use the Trade Barrier Regulation than the Article 133 process. Leather tanners, silk fabric finishers and producers of Parma ham,²²³ for example, are not politically powerful industries. Moreover, they are predominantly small family-owned enterprises located in northern Italy, where they lack close contacts with Italian officials in Rome. TBR has made it more likely that EC officials seriously address their trade problems, and they have correspondingly benefitted.²²⁴

Third, Commission-business partnerships can attempt to use the more transparent TBR procedure as a tool to increase pressure on foreign governments without commencing a formal WTO complaint. As the TBR scores initial successes and becomes better known, the Commission hopes that the bringing of a TBR complaint can pressure foreign governments, especially less powerful ones, to negotiate. The Commission hopes to use the TBR procedure to notify foreign governments

²¹⁹ The procedure generally takes 6 to 7 months.

²²⁰ On the one hand, at least in some cases, nation-based firms may be able to work better through the Article 133 procedure because they can rely on their national representatives. However, larger and better-organized firms at the national level are more likely to have their national representatives take up their claims before the fourteen other member states in the Article 133 Committee.

²²¹ See *infra* note __.

²²² Telephone interview with Mr. Tettamanti of FEDERTESSILE (Feb. 19, 1998).

²²³ For the TBR complaint filed by the consortium of Parma ham producers ("Consorzio del Prosciutto di Parma"), see Notice of initiation of an examination concerning an obstacle to trade, within the meaning of Regulation (EC) No 3286/94, consisting of trade practices maintained by Canada in relation to the imports of Prosciutto di Parma, Official J. of European Communities 1999/C 176/04 (June 22, 1999).

²²⁴ See *infra* note __.

more forcefully that if they do not implement WTO requirements, a WTO claim will follow.²²⁵ For example, the IFPI, an international association of sound recording companies, continues to monitor Thailand's enforcement of copyrights in conjunction with the TBR unit's administration of a complaint originally filed in 1991.²²⁶ From a practical perspective, Thailand has been put on notice that if it does not more effectively crack down on infringers, a WTO complaint may follow.²²⁷

Most businesses, especially larger ones, nonetheless have continued to prefer the Article 133 process for a number of reasons. The Article 133 procedure can avoid the delay of a TBR procedure, which takes approximately six or seven months. It also avoids disclosing arguments to foreign governments, so that they have less time to prepare a defense in a WTO proceeding. Perhaps most importantly, it permits businesses to remain more anonymous, with Commission representatives negotiating the removal of foreign barriers on their behalf. The TBR, in this sense, can be viewed as a formalization of effective public-private partnerships that operate less transparently within the Article 133 process.

One of the goals of the EC's Market Access Strategy was to provide smaller businesses who lack established contacts with better access to Commission officials. This is a more important issue in Europe than in the United States because small and medium-sized enterprises constitute a much larger percentage of Europe's gross domestic product than they do in the United States.²²⁸ The TBR's procedure, at first glance, has been relatively more successful in accomplishing this goal. Nonetheless, a few trade associations have been the primary users of the TBR. EUROFER, which

²²⁵ In some cases, a TBR investigation will be commenced merely because, although the claims are not yet ripe or are less urgent, the Commission still wishes to put the third country on notice.

²²⁶ See *supra* note ____.

²²⁷ UPDATE

²²⁸ The Commission's market access unit developed its database so that it could be in contact through the Internet with small and medium-sized businesses. Prince Interview *supra* note _____. Regarding the importance of small and medium-sized enterprises (SMEs), "we must remember that more than 95 % of enterprises are SMEs. Over 90% of European enterprises are micro enterprises with fewer than 10 employees. SMEs employ 66 % of the workforce in private sector. SME's are not an exception; they are the rule." Remarks of Erkki Liikanen [Member of the European Commission for Enterprise and Information Society], *Economic Policy and Enterprise Culture* (Oct. 14 1999) at a conference organized by UNICE (Union of Industrial and Employer's Confederation of Europe, the peak organization in the EU representing employers), available in <<http://www.europa.eu.int/rapid/start>>.

represents EC steel producers, and COTANCE, which represents EC leather tanners, initiated four of the TBR's first thirteen matters.²²⁹ Two other TBR complaints were brought by members of the EC textile association, EUROTEx: one by the aforementioned Italian silk federation concerning U.S. rules of origin, and one by FEBELTEX, the federation of Belgian textile producers, concerning Brazil's import-licensing system. A seventh TBR matter was brought by the national association of cognac producers,²³⁰ the French branch of the Confederation of European Producers of Spirits (CEPS). If filed before the WTO, the case would be the fourth EC action before the WTO on behalf of CEPS members.

Overall, large multinational businesses and those that are members of national or EC trade associations with offices in Brussels are best positioned to work the system, whether under Article 133 or the TBR. The Scotch Whiskey Association, whose members comprise a major UK export sector,²³¹ is renowned for successfully working with the Commission to pry open foreign markets. The Scotch Whiskey Association worked closely with the European Commission on three WTO

²²⁹ As regards the two matters involving steel, one was brought against the United States, with the claim that its 1916 Antidumping Act is in contravention of the WTO Understanding on the application of antidumping measures, and the other against Brazil in respect of its import-licensing system. As regards the two matters involving leather, one was brought against Argentina and the other against Japan.

As noted above, the Commission has played a central role in most TBR cases. The leather cases were brought after the market access unit commissioned an independent study of barriers faced by the leather industry. COTANCE, which represents hundreds of small leather tanners, did not initiate these complaints on its own. EUROFER, responsible for two TBR complaints, was initially set up by the Commission's initiative, not independently by steel companies. See J.P. Hayes, MAKING TRADE POLICY IN THE EUROPEAN COMMUNITY 140 (1993).

²³⁰ The formal name of the French association of cognac producers is the Bureau National Interprofessionnel du Cognac (BNIC). The BNIC's claim alleges, among other matters, that Brazil has failed to protect its geographical indication, known as an "appellation d'origine", in breach of the WTO TRIPs Agreement. BNIC claims that Brazil permits local producers to sell an alcoholic beverage under the name of *conhague*. BNIC also maintains that its spirits are subject to a discriminatory tax rate in violation of Article III of GATT 1994. Interestingly, one of the first GATT cases, the 1949 case on "Brazilian Internal Taxes," concerned, in part, a claim that Brazilian taxes on *conhague* were in violation of Article III. In defense, Brazil claimed that the products were "quite different from French cognac" so that there was no discrimination, a point that was accepted by the working parties (see GATT Doc. CP.3/42, II/181, at par. 7 adopted June 30, 1949). (This point was made to me by Amelia Porges of the USTR.)

²³¹ According to Dorian Prince of the Market Access Unit, scotch whiskey has been the UK's top export earner. Prince Interview, *supra* note _____. The head of the Scotch Whiskey Association, Tim Jackson, at a conference in Geneva in June 1997 stated that scotch whisky was "among top 5 export sectors with annual exports of 2.8 billion ECU, with EU spirits exports totaling 4 billion ECU." SWA Remarks, *supra* note _____. See also *EU Urged to Act Tough on Spirit Tariff Reforms*, EUR. REP. Oct. 2, 1999 available in 1999 WL 8307282.

complaints-- one against Japan concerning the alcoholic beverage *shochu*, one against South Korea concerning the alcoholic beverage *soju*, and one against Chile concerning the alcoholic beverage *pisco*. The industry's initial success in the 1996 Japan-Alcoholic Beverages case²³² spurred it, through the EC, to bring successful complaints against South Korea and Chile in 1997.²³³ A sophisticated repeat player, the Scotch Whiskey Association likewise worked with the Commission on China's terms of accession into the WTO.²³⁴

The law-in-action of Article 133 and the TBR demonstrates that the decision-making process in the EC for the bringing of foreign trade claims is not a purely "intergovernmental" negotiation among the respective member states and the European Commission over potentially divergent national and EC interests. Rather, it is a dynamic, *ad hoc*, hybrid, multi-tiered process in which well-organized private interests are deeply implicated. It is multi-tiered because private interests work behind-the-scenes simultaneously at the national and supranational levels with member state and Commission representatives in order to profit from the removal of foreign trade barriers. It is *ad hoc* because private businesses coordinate their positions among themselves within, through and between trade associations, and form partnerships with EC public officials, on an *ad hoc* basis. It is a hybrid because the process is neither purely intergovernmental nor purely private.

III. Explaining the United States' More Aggressive Public-Private Partnerships

Although EC private enterprises increasingly work with their trade officials, the U.S. private sector has played a much more proactive role in challenging foreign trade barriers for the following

²³² In the EC's case against Japan, after the WTO Appellate Body found Japanese sales taxes to be discriminatory in violation of WTO rules, Japan agreed to change its regulations. CITE The Appellate Body decision can be found at Japan—Taxes on Alcoholic Beverages, Report of the Appellate Body, 4 Oct. 1996, <<http://www.wto.org>>.

²³³ The Korean case was successfully litigated in 1999 to the spirit producers' benefit, as should be the Chilean case. The EC first brought a complaint against Chile's alleged discriminatory taxation of imported spirits on June 4, 1997. After Chile modified its internal tax regime, the EC brought a new complaint on Dec. 15, 1997, alleging that the modified law is still discriminatory in violation of Article III(2) of GATT 1994. Chile lost this case and has agreed to lower its taxes on distilled spirits to the same level that it charges for its domestic liquor known as pisco. See Rosella Brevetti, *Chile Modifies Distilled Spirits Taxes to Comply with Adverse WTO Ruling*, 18 INT'L TRAD REP (BNA) 204-205 (Feb. 1, 2001).

²³⁴ See SWA Remarks, *supra* note __.

historical, cultural and structural reasons:

(i) U.S. private firms are much more comfortable and experienced with lobbying federal officials, in large part due to the more unified market structure within the United States, as complemented by a more pluralist U.S. political tradition;

(ii) in light of the U.S. “adversarial legalist” tradition and distrust of government, U.S. private firms more likely employ high-powered private law firms to work with trade officials in international trade litigation, whereas EC firms tend to rely on and defer more to the Commission;

(iii) U.S. public officials tend to be more responsive to private lobbying on account of U.S. political-cultural expectations, facilitated by Washington’s “revolving door” career culture, whereas EC officials tend to be more wary of being viewed as favoring firms from one member state as opposed to others; and

(iv) The U.S. political process, characterized by a more active role of Congress, exhorts the USTR to support specific industry and company interests, whereas the EC process urges more caution, especially in light of potential member state conflicts.

A. Role of Lobbying. U.S. firms and trade associations more habitually and brazenly lobby trade officials to challenge foreign trade barriers than do their EC counterparts. Part of the explanation is historical. The United States has had a single market and Washington D.C. has been a center for legislative and agency lobbying long before the European Community existed. In 1997 alone, firms spent over \$1.4 billion on lobbying in Washington, dwarfing the amount spent in Brussels.²³⁵ In contrast, lobbying in Brussels, while rapidly expanding, is largely a phenomena of the last decade, taking off in the clamor toward the single market of “Europe 1992”²³⁶ and the

²³⁵ The \$1.42 billion figure was reported by the Center for Responsive Politics, a research group based in Washington D.C. See *Tab for Washington Lobbying: \$1.42 Billion*, N. Y. TIMES, July 29, 1999, at A14. **Obtain cite for Brussels.** For a report on lobbying by the U.S. pharmaceutical industry, see e.g., Viveca Novak, *How Drug Companies Operate on the Body Politic*, BUSINESS AND SOCIETY REVIEW 58 (winter 1993).

²³⁶ Concerning the publicity given to the Commission’s push for the creation of a “single European market” by 1992, in particular following the 1986 Single European Act. See M.P.C.M. Van Schendelen, *Introduction: The Relevance of National Public and Private EC Lobbying*, in NATIONAL PUBLIC AND PRIVATE EC LOBBYING 1, 6 (M.P.C.M. Van Schendelen ed., 1993). In this effort, 500 measures were passed during a six and a half year period, significantly harmonizing European legislation. See George Berman et al., 1998 SUPPLEMENT TO CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 209 (1998). During this period of heightened EC legislative activity, European firms increasingly followed the legislative process in Brussels. See *id.*; Coen, *The Evolution of the Large*

elimination of national veto rights over most legislative matters.²³⁷ As more European firms operate on an EC-wide basis, and as they are affected by more legislation enacted in Brussels,²³⁸ they target more resources on lobbying EC institutions.²³⁹ European cross-border mergers and acquisitions, and the creation of a single European currency, the Euro, accelerate this trend.²⁴⁰

Nonetheless, small and medium-sized enterprises are responsible for a much larger percentage of Europe's production than the United States', and most of these enterprises, as well as many large European firms,²⁴¹ remain relatively nation-based. For these largely nation-based EC firms, lobbying in Brussels is more remote, and offers them a less obvious payback. As Coleman and

Firm as a Political Actor in the European Union, *supra* note ____, at 95, 99 (concerning "movement towards single-issue groups with a mobile and changing membership" following the Single European Act from the traditional peak European federations, and "trend towards an increasing partnership between firms and the Commission at the European level."); and David Coen, *The European Business Interest and the Nation State: Large-firm Lobbying in the European Union and Member States*, 18 JOURNAL OF PUBLIC POLICY 75 (1998). It is reported that, "Of the ten biggest 'public-affairs consultancies in Brussels, five have arrived since 1990." *The Brussels lobbyist and the struggle for ear-time*, ECONOMIST, Aug. 15, 1998, at 42 [hereinafter *The Brussels Lobbyist*].

²³⁷ As Greenwood notes, "The SEA [Single European Act], and later the TEU [Treaty of European Union], considerably extended the constitutional reach of the qualified majority system of voting." GREENWOOD, REPRESENTING INTERESTS IN THE EUROPEAN UNION, *supra* note ____, at 53.

²³⁸ Cowles has estimated that around 60 percent of all legislation affecting industry in the EC originated in Brussels. See Justin Greenwood, *Organized Business and the European Union*, in ORGANIZED BUSINESS AND THE NEW GLOBAL ORDER (eds. Justin Greenwood and Henry Jacek) 77 (2000) (citing Cowles). GET update-see pollack

²³⁹ See, e.g., Vivien Schmidt, FROM STATE TO MARKET? THE TRANSFORMATION OF FRENCH BUSINESS AND GOVERNMENT 66 (1996) (noting in respect of French business enterprises, "Big businesses in particular now find themselves the privileged interlocutors of the European Union Commission (sic), and partners rather than supplicants of French ministries in the lobbying efforts of the nation") Schmidt notes how "French government officials who typically frowned on lobbying when it involved the national government, even encouraged it when it involved the EU" *Id.* at 235. The importance of Brussels as a center for lobbying is confirmed by representatives of larger businesses. See e.g., Caine, *Power of Persuasion*, *supra* note __ (citing Christopher Boyd of Lafarge SA: "In Europe, Brussels is becoming much more important than national capitals in terms of our government affairs work. Most of the laws that affect us start their lives in Brussels.").

²⁴⁰ See e.g. *Globalizing The New Economy*, Bus. Week, Jan. 31, 2000, at 134 ("The advent of the euro is unifying capital markets and sparking a massive wave of mergers and acquisitions.").

²⁴¹ For example, in the automobile sector, the EC must balance the interests of German car companies that invest and sell in foreign markets and French and Spanish car companies that don't. U.S. auto industry interests are less likely to diverge. This was apparent in the EC's challenges to Brazil's practices in the automobile sector. Action was delayed because of splits among the interests of German versus other European car industries. Interview with ACEA European automobile trade association, June 1999- gcs.

Montpetit have noted, “business associations are more likely to have differentiated territorial structures, the more their members are small rather than large firms, and serve local and regional markets rather than national/international markets.”²⁴² Moreover, much of the legislation enacted at the EC level takes the form of “framework directives” which leave considerable discretion for member state implementation of EC policies.²⁴³ Nation-based EC firms and industries thus continue to more likely contact national representatives on regulatory matters than EC authorities despite the growth in EC-initiated legislation.²⁴⁴ Ironically, the first truly EC-wide enterprises were largely American multinationals, not European firms.²⁴⁵ As a consequence, even in Brussels, multinational U.S. firms remain in the lobbying vanguard.²⁴⁶

U.S. firms, in particular, more aggressively lobby governmental officials to challenge foreign trade barriers than do their European counterparts.²⁴⁷ Even European firms engaged in relatively active lobbying in Brussels on internal market matters, are less active on external commercial affairs.²⁴⁸ Unlike in the United States, European firms do not have direct channels to Commission

²⁴² See William Coleman and Eric Montpetit, *Multitiered Systems and the Organization of Business Interests*, in ORGANIZED BUSINESS AND THE NEW GLOBAL ORDER (eds. Justin Greenwood and Henry Jacek) 160, 164 (2000).

²⁴³ See discussion in... **CITE**.

²⁴⁴ See Coen, *The Evolution of the Large Firm as a Political Actor in the European Union*, *supra* note __, at 93 (stating that “a system of national representation favoring inertia made it illogical for firms to change existing patterns of behavior”). The Article 133 process, which brings together representatives from each member state, is, in this sense, better tailored for working through national representatives. See *supra* note __.

²⁴⁵ Cowles.....

²⁴⁶ “The most effective lobbying force in town [Brussels] is commonly considered to be the EU Committee of the American Chamber of Commerce.” *The Brussels lobbyist*, *supra* note __, at 42. The EU Committee of AmCham represents American multinational in the EU. See Maria Green Cowles, *The EU Committee of AmCham: The powerful voice of American firms in Brussels*, 3 J. EUR. PUB. POL’Y 339 (1996).

²⁴⁷ See John Peterson, EUROPE AND AMERICA IN THE 1990’S 124 (1993).

²⁴⁸ See, e.g., Ostry, GOVERNMENTS AND CORPORATIONS, *supra* note __, at 33 (comparing the political economy of business-government relations in the EC in relation to GATT trade liberalization negotiations with that of internal EC market integration. Ostry states, “The divergence between the role of the major European corporations in the two high policy processes could scarcely be more marked.... [T]he multinational corporations— through their new organization the European Roundtable...— played a fundamentally important and leading role in the strategic formulation of the move to the internal market and have continued to do so as it has proceeded”).

officials on sectoral trade matters.²⁴⁹ They are more likely to consider external affairs as affairs of state. As a Danish representative to the Article 133 Committee affirms, “Our firms do not come to us with trade problems. They try to work around a problem. They tend to invest to get around a barrier rather than fight it.”²⁵⁰ Another member of the Article 133 Committee confirms, “We still tend to see trade policy largely as diplomacy.”²⁵¹ As a lobbyist for the chemical industry’s trade association adds, “We Europeans still see ourselves as negotiators. We are not a litigious people.”²⁵² Correspondingly, in many EC member states, foreign affairs diplomats retain ultimate national authority over trade matters.²⁵³ In contrast, U.S. multinational firms have developed a lobbying culture which is much more aggressive on international trade. For them, lobbying is less controversial and more routine. As a lobbyist from the U.S. intellectual property industry complains, “Our European counterparts in business are timid. They don’t like to rock the boat. Our business is

²⁴⁹ See Maria Green Cowles, *Private Firms and US-EU Policy-Making: The Transatlantic Business Dialogue*, in EVER CLOSER PARTNERSHIPS: POLICY-MAKING IN US-EU RELATIONS, 229, 241 (Eric Philippart and Pascaline Winand, eds) (2001) (“European business has not formally organized itself in Brussels to lobby Commission officials on trade issues... US industry for example, has direct channels to the Commerce Department and USTR on trade issues through ISACs. European industry does not.”).

²⁵⁰ Interview (May 1999).

²⁵¹ Interview in Brussels (June 1999).

²⁵² Interview with Reinhold Quick, lobbyist for CEFIC (the European Chemical Industry Council) (June 1999, Brussels). The EC does not issue a general report on trade barriers such as the U.S. Section 301 and Special 301 reports. While the EC issues an annual report on U.S. trade barriers, it does not attempt to use the report as a lever to force open the U.S. market. Unlike the U.S. reports, the EC’s report on U.S. trade barriers is not published with fanfare on a set date at which time new WTO complaints are announced.

EC authorities tend to be more deferential than the U.S. to developing country interests, such as those of former EC colonies. For example, both the U.S. and EC brought WTO complaints against India’s use of quotas invoked on balance-of-payments grounds. India continued to limit imports to protect its balance of payments even though it had long had a surplus of currency reserves, as confirmed by representatives from the International Monetary Fund. The EC settled with India to gradually phase out its quotas within __ years. The United States, however, refused India’s offer and continued its complaint before the WTO’s dispute settlement body. U.S. industries harness U.S. negotiating and litigation clout to obtain concessions from foreign governments, whatever their development status. Says a U.S. trade representative, “Our European colleagues criticize us for being too aggressive, but then complain when we get a better deal for our firms.” Interview with USTR official, May 1999.

²⁵³ In contrast, the USTR was granted leadership on external trade policy over the Department of State precisely because Congress perceived that the USTR was more responsive to specific U.S. private interests as opposed to general diplomatic relations. See *supra* note __.

to stir things up, not smooth things over. We thrive on confrontation."²⁵⁴

In addition to the market structure explanations examined above, individual European firms have been less aggressive lobbyists because of the more centralized and corporatist traditions of most member states. In corporatist systems in Germany and Scandinavia, firm interests typically are aggregated into peak organizations which negotiate alongside state and labor representatives on matters of mutual concern.²⁵⁵ In centralized systems as in France, the state through its professional civil service plays a more dominant "top down" role.²⁵⁶ In each case, firms are more accustomed to working with state public officials through hierarchical trade confederations that, in turn, combine federations of multiple industrial sectors, such as the BDI in Germany, the MEDEF in France and UNICE in the EC.²⁵⁷ Even though lobbying in Brussels has become relatively more decentralized, most European firms continue to lobby through "peak" trade associations representing firms throughout Europe on a cross-sectoral or sectoral basis.²⁵⁸ When lobbying is conducted through

²⁵⁴ Interview (May 1999).

²⁵⁵ Philippe Schmitter presents classic corporatism as a system where actors "are organised into a limited number of singular, compulsory, non-competitive, hierarchically ordered and functionally differentiated categories." Philippe C. Schmitter, *Still the century of corporatism?*, REV. OF POL. 85 (1974). This is changing, though not yet to the extent of the U.S. decentralized model of lobbying. For an assessment of different forms of capitalism, see GOVERNING CAPITALIST ECONOMIES: PERFORMANCE AND CONTROL OF ECONOMIC SECTORS (J. Rogers Hollingsworth et al. eds., 1994). See also Peter Katzenstein, *International Relations and Domestic Structures: Foreign Economic Policies of Advanced Industrial States*, 30 INT'L ORG. 14 (1976) (noting the United States is "a country marked by a strong society and a weak state").

²⁵⁶ See Schmidt, FROM STATE TO MARKET?, *supra* note ___, at 47 (referring to France's "statist tradition" "in which government has the power and authority to take unilateral action at the policy formulation stage, without prior consultation with those most interested in the policy").

²⁵⁷ The BDI is the acronym for the Bundesverband der Deutschen Industrie, the MEDEF is the acronym for the Movement des Entreprises de France (which superceded the CNPF, or Conseil National du Patronat Francais in 1998) and UNICE for Union des Confederations de l'Industrie et des Employeurs d'Europe (the Union of Industrial and Employers' Confederation of Europe). The CBI, or Confederation of Business Industries, is the peak business trade association in the UK, but is less important for national industry than its German and French counterparts. See Maria Green Cowles, *The Transatlantic Business Dialogue and Domestic Business-Government Relations*, in TRANSFORMING EUROPE: EUROPEANIZATION AND DOMESTIC CHANGE (Maria Green Cowles, James Caporoso and Thomas Risse, eds.) (2001), at 159, 163-165.

²⁵⁸ As Justin Greenwood notes, "There are now over 600 formal European level business associations.... and approximately 250 firms with representatives offices in Brussels." Justin Greenwood, *Organized Business and the European Union*, in ORGANIZED BUSINESS AND THE NEW GLOBAL ORDER (eds. Justin Greenwood and Henry Jacek) 77 (2000). Greenwood adds that "some two-thirds of Euro groups are federations of national organizations." *Id.* at

“peak” associations, individual firm views are diluted or offset by other firms’ countervailing priorities.²⁵⁹ Moreover, where firms’ views and interests are divided along national lines— a legacy of traditionally segregated European markets— these peak institutions become even less effective for an individual firm on a specific trade matter. These European cultural distinctions are somewhat diminishing, as demonstrated by the increased role of large multinational European firms through the Transatlantic Business Dialogue (TABD).²⁶⁰ Nonetheless, individual European enterprises remain less likely to directly lobby EC agencies on trade policy than are the U.S. counterparts.

In contrast, large U.S. firms tend to employ well-staffed governmental affairs departments which track and strategize to shape legislation and regulatory policy. These firms do not simply consult with, or defer to, state representatives, but, under a model of shareholder capitalism, their responsibilities are primarily to maximize returns for their shareholders.²⁶¹ They do not interact with a database set up by a bureaucratic agency. They do not need to work through the intermediary of member state officials who speak their native tongue. They do not defer lobbying to “peak”

96.

²⁵⁹ As Justin Greenwood writes, “In order to arrive at ‘an opinion’, UNICE has to seek to reflect the broad constituency of its members interests and positions, which are in turn very often the result of compromises made at the national level. To help it arrive at common positions, UNICE uses its network of permanent committee structures, which in turn heightens the tendency for compromise. thus, the organization is well recognised for providing generalized, ‘lowest common denominator’ positions which are not always very helpful in providing the institutions with a clear signal to act upon. Justin Greenwood, *Organized Business and the European Union*, in ORGANIZED BUSINESS AND THE NEW GLOBAL ORDER (eds. Justin Greenwood and Henry Jacek) 77, 81-82 (2000).

²⁶⁰ See Maria Green Cowles, *The Transatlantic Business Dialogue and Domestic Business-Government Relations*, in TRANSFORMING EUROPE: EUROPEANIZATION AND DOMESTIC CHANGE (Maria Green Cowles, James Caporoso and Thomas Risse, eds.) (2001), at 159, 162-163 (“Before the TABD, there was no significant business-government relationship at the European level in external trade matters... The TABD changed this business-government dynamic. With the creation of the TABD, a new business-government relationship emerged in Brussels in common commercial policy.”). Cowles argues that TABD serves to weaken the traditional national industrial associations by encouraging firms to bypass them and directly contact Commission and national officials. *Id.*, at 171. Even with the TABD’s advent, however, EC business lobbying on external trade matters, although moving in the direction of a U.S. model, remains far from it in practice. For further discussion of TABD, see *infra* notes ___ and accompanying text. As Cowles herself writes, “While big business-European Commission relations have developed in other policy areas over the past two decades, this pales in contrast to the century-old relations between continental NIAs [national industry associations] and their respective governments.” *Id.*, at 176.

²⁶¹ On the notion of “shareholder capitalism” vs European forms of capitalism, see e.g. NATIONAL DIVERSITY AND GLOBAL CAPITALISM (eds. Suzanne Berger and Ronald Dore) (1996); ROBERT BOYER & DONALD DRACHE, STATES AGAINST MARKETS: THE LIMITS OF GLOBALIZATION (1996); GOVERNING CAPITALIST ECONOMIES: PERFORMANCE AND CONTROL OF ECONOMIC SECTORS (J. Rogers Hollingsworth et al. eds., 1994).

organizations, such as UNICE. When they have trade problems, they directly contact the USTR. They only work through associations, where their views coincide with those of others firms. Moreover, these associations often operate on an *ad hoc* basis— witness the Coalition Against Australian Subsidies.²⁶²

Faced with these different historical legacies, the Commission has had to lobby firms to lobby it in order for it to more effectively enforce European trading rights. The TBR unit, for example, has actively solicited EC businesses to submit petitions under the regulation. As stated by Alistair Stewart, head of the TBR unit, “the Commission would like a new reflex to be developed on [business’s] part, and considers that this would be very much in their interest.”²⁶³ Successful use of TBR, Stewart emphasized, will require “a certain change in attitude in EC companies.”²⁶⁴ To develop this reflex, the Commission has held press conferences, distributed glossy brochures, contacted European trade associations to bring claims, and prepared claims for them. The Commission’s TBR unit wrote the TBR complaint for the Italian silk industry.²⁶⁵ It hired a consultant to identify barriers for the leather industry, leading to TBR cases filed against Argentina and Japan.²⁶⁶ Whereas U.S. Section 301 formally goes back to 1974, and has even earlier legal precedents, the Commission’s earlier NCPI procedure was poorly regarded by firms.²⁶⁷ The TBR unit has attempted to overcome this historical legacy. One of the Commission’s central goals with the TBR has been to socialize EC firms to work with the Commission to take more effective

²⁶² See *infra* note ____.

²⁶³ Alistair Stewart, *Market Access: A European Community Instrument to Break Down Barriers to Trade*, vol. 2 Int’l Trade L. & Reg. 121, 123, 125 (1996). The efforts of the Commission to stimulate greater public-private interaction in the EC is not limited to the trade realm. Greenwood also notes the “entrepreneurial role of the European Commission, in particular, in funding the start up of Euro groups” in respect of EC lobbying generally. See Greenwood, *Organized Business and the European Union*, *supra* note ____, at 97.

²⁶⁴ *Id.* Similarly, Destler notes that the creation of public-private links in the United States helped change business behavior and expectations toward the international trading system. See I.M. Destler, *AMERICAN TRADE POLITICS: SYSTEM UNDER STRESS* 94 (1986).

²⁶⁵ See *supra* note ____.

²⁶⁶ Interview with the representative of leather trade association COTANCE (June 1999). Confirmed in interviews with Commission officials.

²⁶⁷ See *supra* note ____.

offensive action against foreign trade barriers.²⁶⁸

B. Use of Private Lawyers and Litigation. Having long operated within corporatist and centralized civil law systems (with the United Kingdom as an exception), European companies and trade associations less frequently employ private lawyers and rather let the Commission's professional civil servants take the lead on trade matters.²⁶⁹ National and European trade associations have traditionally worked without the assistance of attorneys. When bringing offensive claims against foreign trade barriers under the Trade Barrier Regulation, European companies and associations tend not to hire lawyers to advance their arguments. For European companies, "this is the Commission's job."²⁷⁰ Lawyers in the Commission's Legal Services division who bring and defend WTO cases confirm that they do not receive well-prepared cases from industry,²⁷¹ but rather must go to EC firms with requests. The understaffed Legal Services Division may sometimes hire an outside law firm for assistance, but this law firm works for the Commission, not a private firm, and thus the arrangement does not involve a public-private partnership.²⁷²

²⁶⁸ EC industry traditionally focused on defensive measures to protect its market from imports, and not on offensive measures to challenge foreign protectionist practices. *See supra* notes __

²⁶⁹ Interview with Jacques Bourgeois, former member of the Commission and now member of the EC trade bar, working for the Washington DC-based firm Akin, Gump (June 1999, Brussels). In the application of EC antidumping law, the Commission acts as an "examining magistrate" who predominates the proceedings. *See* Edwin Vermulst, *The Antidumping Systems of Australia, Canada, the EEC and the U.S.A.*, in *ANTIDUMPING LAW AND PRACTICE*, *supra* note __, at 430. The EC system is structured so that "the investigating authorities [the Commission] are the only ones with access to the complete file." Private parties only receive non-confidential summaries that "are generally of limited value." *Id.*, at 431.

²⁷⁰ Interview with EC trade association (Brussels, June 1999). Confirmed by members of the Commission's TBR unit.

²⁷¹ Moreover, where the Commission has gone to both U.S. and European firms for information on a common foreign trade barrier, the U.S. firm has often provided more information. Interview with a member of the TBR unit, Brussels, June 1999.

²⁷² The Commission's legal services division is currently understaffed. It thus must sometimes hire outside law firms to assist it in WTO cases. These outside firms have sometimes been of U.S. origin. The Commission pays the firms a lump sum, which is significantly less than normal fees. Since the law firms are not paid by private enterprises or trade associations, this does not constitute a public-private partnership in the sense used in this article. An exception where European companies paid a law firm to provide substantial legal support to the Commission was the hiring by Daimler Benz (Mercedes) and BMW of the Washington firm Hogan & Hartson to assist with the 1994 GATT case U.S.- Corporate Average Fuel Economy (interview with a member of the Commission's Legal

European trade associations and firms are similarly less proactive on defensive trade cases. Although European trade associations may hire an internal lawyer to monitor an antidumping claim, the employee tends to be relatively young and inexperienced.²⁷³ Trade lawyers in Brussels lament that they receive fewer cases and, even then, cannot demand the fees that Washington firms haul in.²⁷⁴ European firms clamp the purse. The idea of an individual enterprise forcing the government's hand on international economic matters through a legal procedure remains relatively alien to their traditions.

In contrast, in a more adversarial legalist U.S. system,²⁷⁵ U.S. firms not only budget government affairs departments and retain professional lobbyists; they also hire lawyers to defend their interests in trade claims.²⁷⁶ U.S. companies and trade associations do not trust government

Services division).

As regards an understaffed Commission more generally, see N. Nugent, *The Government and Politics of the European Union* ____ (1994) (calculating a ratio of 0.8 staff in EU institutions per 10,000 European citizens, compared to a staff ratio of 322 per 10,000 citizens at the member state level), cited in GREENWOOD, *REPRESENTING INTERESTS IN THE EUROPEAN UNION*, *supra* note __, at 34.

²⁷³ Interview with Reinhold Quick, *supra* note ____.

²⁷⁴ Even when bringing defensive anti-dumping claims to protect domestic markets from low-priced imports, European firms usually do not hire lawyers. They merely file a petition for antidumping relief or for a TBR investigation with the European Commission-- after having already obtained the Commission's informal support of such filing-- and let the Commission do the work. This fact is confirmed by lawyers and government officials in Washington and Brussels. There are, however, already some notable examples of EC lawyer participation. For example, Marco Bronckers, now of the Dutch firm Stibbe, Simont, Manahan, Duhot, was involved in a number of New Commercial Policy Instrument cases. Bronckers represented Akzo in its controversial challenge to U.S. Section 337 of the 1974 Trade Act. He recently represented Korea before the WTO case brought by the EC and U.S. against Korea's tax practices involving the alcoholic beverage *soju*.

²⁷⁵ In his analysis of American regulation, Bob Kagan discusses how it has been shaped by particular aspects of American culture, including "(1) a political culture that continues to reflect deep mistrust of governmental and business power, and (2) political structuresC separation of powers, politically divided government, loosely disciplined political partiesC that fragment governmental and Congressional power." See Robert Kagan, *How Much Do National Styles of Regulation Matter?*, *REGULATORY ENCOUNTERS: MULTINATIONAL CORPORATIONS AND AMERICAN ADVERSARIAL LEGALISM* 16 (Robert Kagan & Lee Axelrad eds., 1998). Kagan finds that the U.S. "style" of regulation is "more adversarial and legalistic than regulation is in other countries." *Id.* at _____. See also Kagan, *Adversarial Legalism and American Government*, in *THE NEW POLITICS OF PUBLIC POLICY* 88-118 (Marc Landy & Martin Levin eds., 1995).

²⁷⁶ The Washington trade bar is much larger than the Brussels bar, with approximately 2100 lawyers registered in Washington as trade lawyers. Information obtained from the office of the Washington D.C. Bar International Trade Section and interviews in Brussels, Belgium with members of the private bar, June 1999.

officials to do their job when sales and profits are at stake. They engage law firms to assist them in offensive Section 301 complaints (challenging foreign trade barriers) and defensive antidumping and subsidy claims (protecting against foreign imports). In antidumping cases, firms hire antidumping law specialists to construct and expound arguments throughout the process.²⁷⁷ If WTO cases are brought, U.S. firms work closely with their USTR partners. U.S. firms hire “pros,” often former senior members of the USTR, such as Bob Cassidy at Wilmer Cutler & Pickering, Alan Wolfe at Dewey Ballantine or Warren Maruyama at Hogan & Hartson.²⁷⁸

The U.S. common law tradition thus may benefit U.S. firms in WTO litigation.²⁷⁹ Under the common law system, lawyers play a much more important role in litigation than public authorities, such as reporting judges and advocates general in the EC system, which in turn borrows from the continental legal systems and in particular the French.²⁸⁰ In particular, lawyers play a much more significant role in the United States in discovery and presentation of the facts before legal and administrative law tribunals. They also are accustomed to a more contextualized approach to legal doctrine, pursuant to which legal principles are applied more flexibly to specific factual scenarios. As the WTO system has moved toward a more fact-intensive approach,²⁸¹ firms operating in common law traditions and experienced with working with lawyers working in the common law tradition may be somewhat advantaged. The fact that British associations, such as the Scotch

²⁷⁷ Antidumping law is extremely technical, involving the calculation of preliminary and final antidumping margins, the definition of the relevant product market, and the determination of whether “material injury” criteria are fulfilled.

²⁷⁸ Lawyers in the EC are slightly disadvantaged because international trade law has been taught less at law schools in the EC than in the U.S.. A significant number of lawyers in the Commission and in the Brussels bar that work on international trade matters have studied international trade law in the United States. Those who studied with Professor John Jackson while he was at the University of Michigan Law School commonly refer to themselves as the “Michigan mafia.” The Commission’s legal services division is concerned that the U.S. is correspondingly exercising greater influence in the development of WTO jurisprudence, which is borrowing from such U.S. legal concepts of reasonableness, agency discretion and provisional measures. (Jahnssen and Kuyper interviews).

²⁷⁹ I thank Colin Picker for highlighting this point. **Add general cites re common v civil law, as well as specific articles assessing application to WTO situation**

²⁸⁰ See discussion in *Cases and Materials on European Community Law* (George Bermann et al., eds.) 70-72 (1993).

²⁸¹ *See supra* note ____.

Whiskey Association,²⁸² have been primary beneficiaries of the EC Market Access Strategy supports this analysis.

C. Career Civil Servants and Revolving Doors. In light of EC traditions, EC officials tend to have a different perception of their role than their U.S. counterparts, one that has a higher social status than in the United States. The Commission is organized largely on a French continental model of “fonctionnaires,” or public servants, who tend to graduate at the tops of their classes from elite universities. EC bureaucrats are relatively better paid than their U.S. counterparts, and are more likely to pursue a career as civil servants.

A central explanation, in addition to cultural factors, for the different attitudes of EC officials toward firm lobbying concerns Europe’s political structure. EC officials face a more complicated situation than their U.S. counterparts since jealous member states are wary that Commission officials could favor one national interest (in particular that of the official’s home state) over another.²⁸³ As Greenwood writes, “the Commission’s preferred strategy is to seek principal forms of dialogue from [Euro groups].”²⁸⁴ The mantra of Commission officials is to serve the “Community interest” or “public interest,” not a specific interest of a specific firm from a specific member state.²⁸⁵ WTO cases “must be viewed as EC cases.”²⁸⁶ Some consider it “dangerous for their careers to be seen fraternizing with industry.”²⁸⁷

²⁸² See *supra* note __.

²⁸³ This may be one reason that Cowles finds that Europe is more likely to take a “package approach” to trade negotiations as opposed to a sectoral one,” an approach she finds “is frustrating at times to European business.” Cowles, *Private Firms and US-EU Policy-Making*, *supra* note __, at 242.

²⁸⁴ GREENWOOD, REPRESENTING INTERESTS IN THE EUROPEAN UNION, *supra* note __, at 4.

²⁸⁵ Similarly, Cowles cites a Commission official as noting that “DG1 tends to focus on the ‘wider public interest’ as opposed to industry concerns *per se* in trade negotiations” and that Commission perceptions are based on “what they believe are the larger societal interests— including those of labor, consumer, and environmental groups.” Cowles, *Private Firms and US-EU Policy-Making*, *supra* note __, at 242.

²⁸⁶ Interview with DG1 official (Brussels June 1999).

²⁸⁷ Interview with DG1 official (Brussels June 1999).

Because of U.S. traditional distrust of “big government”²⁸⁸ and corresponding U.S. traditions of lobbying and legal challenges to administrative decision-making,²⁸⁹ U.S. officials are more accustomed to routinely work with private firms. The career civil servant, for example, is rarer in the “revolving door” arcades of Washington. Lawyers and lobbyists in Washington, enhance their resumes by splashing a few years in public life to subsequently-- and lucratively-- serve private commercial clients. Former USTR representatives populate Washington law firms and trade associations and accumulate far more trade law experience than the new recruits of public agencies.²⁹⁰ Young attorneys in USTR face lobbyists who are both former high-ranked USTR officials and potential future employers. The pressure to positively respond to requests and suggestions stems not just from a moral calling to serve the “U.S. public interest,” but also an economic incentive to prop one’s personal prospects. This revolving door in Washington forges better understanding among public and private representatives. Playing (or desiring to play) both roles enhances each side’s willingness, appreciation and effectiveness in the partnership.

Accordingly, the USTR more readily supplies firms with information about a trade position or strategy. U.S. lobbyists state that the USTR understands that the USTR’s role is to represent U.S. enterprises’ export interests, or, as one representative puts it bluntly, to “serve us.” U.S. firms complain that Commission officials, on the contrary, are more condescending and less helpful than USTR personnel. As a U.S. lobbyist on intellectual property matters cheers, “Our government is wonderful in supporting our industry. The European Commission is always less supportive.”²⁹¹

²⁸⁸ Polls show that, compared to the U.S. public, Europeans have both a higher respect toward civil servants and a lower respect for business executives pursuing private profit. Public perceptions shape actors’ perceptions of themselves. They reinforce U.S. public officials’ responsiveness to private interests and European private interests’ deference to public officials.] **Cite-need** polling data- or cut

²⁸⁹ *See supra* note ____.

²⁹⁰ Former USTR officials Alan Holmer and Judith Bello are now respectively President and Executive Vice President of PhRMA. *See PhRMA 1999 Annual Report* at <www.phrma.org/publications/annual99/s_staff.html> (visited March 12, 2000). Former USTR Robert Strauss is now a chief lobbyist at Akin Gump and former EC chief negotiator during the Uruguay Round Hugo Paeman is now with Hogan & Hartson. *See also, supra* note _____. Former Assistant Secretary of Commerce Franklin Vargo is now Vice President for International Economic Affairs of the National Association of Manufacturers. *See Gary Yerkey, U.S. Companies Launch Bid to Bridge Divide in Congress over Labor, Environment*, 18 INT’L TRADE REP (BNA) 225-226 (Feb. 8, 2001).

²⁹¹ Interview with representative of U.S. intellectual property association (May 1999).

Nonetheless, the Commission is attempting to make itself more responsive to private trading interests, albeit less so than U.S. firms would prefer. Both the Market Access Strategy and the TBR mechanism are tools not only to socialize European firms to work with the Commission, but also to socialize Commission officials to collaborate with firms and thereby develop the reflexes that enable facilitate public-private partnerships.

D. Impact of Political Processes: Congressional Pressures and Member State Jealousies. U.S. and EC political processes work in opposite directions toward the establishment of public-private partnerships in litigating WTO claims. The U.S. political process exhorts the USTR to support specific industry and company interests whereas the EC process urges caution. Through the U.S. political process, U.S. firms have greater leverage over U.S. trade policy. U.S. firms, their executives and shareholders, finance congressional and presidential political campaigns. Members of the House of Representatives, representing small districts often dependent on company or industry-specific employment, can be particularly subject to individual firm pressure.²⁹² Their two year terms subject them to almost constant campaigning. Congress created the USTR to be responsive to private interests and to be subject to Congressional watchdog committees.²⁹³ These committees call the USTR before them to testify and explain its actions. If unsatisfied with USTR policy, Congress retains the power to initiate and pass legislation forcing the USTR to act, on the one hand, and withhold granting trade negotiating authority, on the other.²⁹⁴

The European political process, on the contrary, can slow the development of close Commission-private sector partnerships. First, there is little to no Parliamentary pressure on European trade officials to act on behalf of specific constituent industries. At the EC level, the

²⁹² Members of the U.S. Congress are also freer to “behave like local representatives rather than members of a national organization bearing collective responsibility for government.” *Politics Brief*, THE ECONOMIST, July 24, 1999, at 51. A U.S. President, once elected, is more secure in power than a European prime minister. A negative vote under a European Parliamentary system brings down the government in power, so that “members of Parliament must toe a party line.” *Id.*

²⁹³ These are the trade subcommittees of the Senate Finance Committee and the House Ways and Means Committee.

²⁹⁴ Congress’ last grant of “fast-track” trade negotiating authority to the executive expired in ___. See *supra* note ___.

European Parliament has no power over external trade matters and is only consulted on trade policy by the European Commission and Council, pursuant to an informal procedure.²⁹⁵ As for the member states, European executive agencies largely control trade policy, and are not subject to parliamentary pressure. Under European parliamentary systems, members of parliament tend to vote on a party line or risk a vote of no-confidence leading to a new election, putting their seats at risk.²⁹⁶ Moreover, they are elected through a list system and thus are also less subject to local company pressure. Thus, member state executive departments are more able to balance competing constituent interests on a nation-wide basis.²⁹⁷

Second, the European Commission must balance the desires of fifteen EC member states with different national industries. Inter-state rivalries in the United States are less prevalent since there has long been a single U.S. market, so that there is much less inter-state conflict over U.S. trade policy.²⁹⁸ Commission officials, on the contrary, must be constantly wary of not appearing to favor certain EC member state interests over others. If a Commission unit becomes too close to a private commercial interest, it may be challenged by EC member states with competing commercial interests. Similarly, European firms face additional obstacles because Commission decisions are subject to indirect control by member states. They often must lobby at both the national and

²⁹⁵ The European Parliament has no power over trade policy under the Treaty Establishing the European Community (as amended through the 1999 Treaty of Amsterdam). The European Commission and Council have merely agreed to consult with it under the Luns- Westerterp procedures. *See* George Bermann et al., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* 894 (3d ed., 1993). Even if the Parliament had power and firms went to Parliamentary representatives, the Parliament is only elected every four years and is elected by a list system, not by separate electoral districts. Consequently, EC Parliamentarians are less affected by local industry and company concerns.

²⁹⁶ Parliamentarians in Europe are less subject to local company pressure because they are elected through a list system. Moreover, if they vote against the government in a no-confidence vote, this would trigger new elections in which the parliamentarian could lose his or her seat. **CITE.**

²⁹⁷ In addition, the lead member state executive agency, in many member states, remains the foreign affairs ministry, an agency that more likely favors general foreign policy concerns over specific company commercial interests. *See supra* note ____.

²⁹⁸ *See supra* note _____. As a consequence, EC member states are suspicious that an action in one sector important to one European country could adversely affect sectors important to it.

European levels, especially where they use the Article 133 procedure.²⁹⁹ Even where an enterprise successfully lobbies its national representative to assist it, that is only one vote of fifteen. The other member states can delay or block the bringing of a trade claim.³⁰⁰

IV. Transatlantic Public-Private Partnerships: Their Development and Limits

U.S. and European firms and industries often face common barriers to trade, be it in Asia, South America or elsewhere. When they are not litigating against each other, they are often on the same side challenging third country import barriers, such as Indonesia's former nepotistic "national" car policy, India's non-recognition of patents, and Japan's and Korea's discriminatory taxes on hard alcohol. Of the first ten WTO cases brought by the EC against WTO members other than the United States,³⁰¹ the United States was also a complainant in five and a supportive third party in four. Of the first ten WTO cases brought by the United States against WTO members other than the EC,³⁰² the EC was also a complainant in five, and a supportive third party in one. This raises the following

²⁹⁹ As Greenwood writes, "In practice, interests tend to use a combination of routes simultaneously," referring to a "national route" and a "European route." See GREENWOOD, REPRESENTING INTERESTS IN THE EUROPEAN UNION, *supra* note __, at 11.

³⁰⁰ Intellectual property and services claims have been particularly subject to member state interference since they should require unanimous member state support. See discussion of the Court of Justice's Opinion 1/94, *supra* note _____. A case involving U.S. trademark legislation demonstrates how member state oversight results in delay and uncertainty. Baccardi owned the trademark "Havana Club" prior to its confiscation following the Cuban revolution. The French firm Pinot-Ricard, the trademark's current owner worldwide, cannot register it in the United States because of U.S. legislation recognizing Baccardi's earlier rights. Pinot-Ricard asked the French representative and the Commission to obtain approval from the Article 133 Committee to challenge the U.S. legislation before the WTO as a violation of the TRIPs Agreement. The Commission, however, could not commence WTO consultations for months because Italy vetoed any WTO action. Although Italy finally authorized the Commission to commence formal WTO consultations, the Commission still had to obtain unanimous member state approval before requesting the formation of a WTO panel-- resulting in further delay and uncertainty. Some member states feared that the United States was offering special favors to Italy to impede EC action, such as agreeing to target non-Italian exports in the United States' retaliation against the EC's WTO-illegal banana regime. Interview with member of the Article 133 committee (June 1999, Brussels). See also Larry Speer, *Battle over Cuban Rum Trademark New Threat to EU-U.S. Relations*, 17 Int'l Trade Rep. 269, Feb. 17, 2000; *EU Member States Split on Approval for WTO Panel on Section 211*, 18 Inside U.S. Trade 1, March 10, 2000. Update with bna cites/law rev article explaining

³⁰¹ This covers only cases pursuant to which a dispute settlement panel was demanded and formed, and not where only formal consultations took place under WTO auspices.

³⁰² This covers only cases pursuant to which a dispute settlement panel was demanded and formed, and not where only formal consultations took place under WTO auspices.

questions: To what extent have public-private partnerships for the litigation of trade claims by the United States and EC become transatlantic partnerships? To what extent has transatlantic cooperation been at the initiative of trade officials or of private parties? To what extent have domestic private parties (from the United States or Europe) assisted foreign trade authorities (in Europe or the United States) to challenge domestic regulations that they want changed?

A. Limits to Transatlantic Cooperation Between Trade Officials. U.S. and EC trade officials do not cooperate to any significant extent in the bringing of trade claims against common foreign trade barriers for three prevailing reasons: (i) the competitive, mercantilist relationship between trade officials; (ii) the need to protect vulnerable domestic regulations when challenging foreign barriers, leading to potential conflicts even when bringing a common complaint; and (iii) the lack of continuity of USTR personnel on account of Washington's "revolving door" political culture.

First, rivalry lingering from WTO cases fought against each other impedes cooperation against common targets. As good mercantilists, trade officials strive to win offensive cases and penetrate foreign markets, while simultaneously defending domestic regulations and protecting domestic industries. Representatives from the U.S. Congress and EC member states press their trade czars to aggressively bring, defend and, above all, win cases against each other. The combative rivalry of "beating" the other side, be it about hormone-raised beef, quotas on banana imports, or trade-related tax policies, constrains collaboration. Officials from antitrust departments, justice departments and other agencies find cooperation easier since, in their work, they confront common problems and rarely must defend domestic regulations against a foreign counterparts' challenge.³⁰³ This is not the case for trade officials. The United States and EC bring more WTO cases against each other than against any other WTO member.³⁰⁴ Score cards are notched. Pressure flares. Scars remain.

The United States and EC both wish to expand access to foreign markets, but for their own

³⁰³ See e.g. Youri Devuyt, *Transatlantic Competition Relations*, in *TRANSATLANTIC GOVERNANCE IN A GLOBAL ECONOMY* (Mark Pollack and Gregory Shaffer, eds) (2001). ("Transatlantic relations in the sphere of competition policy are a perfect example of what Anne-Marie Slaughter has labeled a "new transatlantic order" with specific and functional regulatory agencies networking with their counterparts and creating a dense web of 'fast, flexible, and effective' relations"); Mark Pollack and Gregory Shaffer, *Who Governs?*, in *TRANSATLANTIC GOVERNANCE IN A GLOBAL ECONOMY*, *supra* note __, at (.....).

³⁰⁴ This is the result of a simple correlation. The more trade between two WTO members, the more likely a trade dispute arises.

national firms only. Moreover, they each prefer for the other to be aggressive, thereby benefitting from enhanced market access while retaining friendlier relations with the foreign country for other purposes-- whether to obtain support on foreign policy issues or lucrative government procurement contracts for national firms. The United States criticizes the European Community, in particular, for toadying to developing countries that were former colonies in the hope of cornering their markets for other European commercial interests.³⁰⁵

Second, even when bringing complaints against common barriers, U.S. and EC officials may structure arguments differently to protect vulnerable domestic regimes. For example, in the *Japan-Alcohol* case, they transformed their common challenge to Japan's discriminatory tax system into a U.S.-EC dispute over the legal criteria to be applied. In doing so, they parried over an earlier conflict between them concerning U.S. tax policies affecting European cars. In 1994, the EC had challenged U.S. anti-pollution taxes on the "corporate average fuel economy" of car fleets under the GATT. Congress, lobbied by U.S. car manufacturers, had chosen fuel economy thresholds whereby, in practice, only foreign luxury vehicles were subject to the tax. In the case *U.S. - Taxes on Corporate Average Fuel Economy (CAFE)*, a GATT panel upheld the U.S. defense that its taxes were permissible under GATT rules because they were designed with the legitimate aim of combating air pollution.³⁰⁶ The Europeans were furious. In the new *Japan-Alcohol* case, they again argued that a complainant need only show a discriminatory effect to establish discrimination. The United States again retorted that a complainant must also prove a discriminatory intent. The WTO panel and Appellate Body appeared to side with the EC so that the United States both won the *Japan-Alcohol* case (on the merits) and apparently lost it (on the legal reasoning).³⁰⁷ The U.S.-EC side show irritated the U.S. spirits industry, which only desired the taxes' removal and was vexed by the additional

³⁰⁵ See *supra* note ____.

³⁰⁶ The case was decided during the period that the Agreement Establishing the WTO had been signed but not yet ratified by the U.S. Congress. There is suspicion that the GATT panel's reasoning may have been influenced by the U.S. domestic political context in which U.S. environmental groups were split as to whether to support U.S. ratification of the Agreement Establishing the WTO.

³⁰⁷ Cite from bna and law rev article re U.S.-EC split- cite hudec re lack of clarity of ab decision on this point

hurdle of proof proposed by its government.³⁰⁸ U.S. authorities, however, were necessarily concerned about the impact of the Japan-Alcohol decision were the EC again to challenge the discriminatory impact of U.S. automobile taxes under the new WTO regime.

Third, Washington's revolving door promotes public-private partnerships at home and impedes transatlantic public agency coordination. Officials in the Commission's market access unit abandoned efforts in the mid-1990s to institutionalize more cooperation with U.S. representatives when their U.S. counterparts left the USTR for the private sector.³⁰⁹ From January 1998 to mid-1999, for example, the chair of the Section 301 Committee changed three times, with one official leaving to the telecommunications giant AT&T and another to a private organization promoting U.S.-African relations. To be sure, U.S. and EC trade officials periodically contact each other concerning their positions on trade barriers and, where helpful, profit from each other's submissions to WTO panels. Yet, lack of continuity at USTR hampers sustained strategic U.S.-EC coordination at the same time that it facilitates the work of U.S. domestic public-private partnerships.³¹⁰

B. Cross-National Public-Private Partnerships: Collaborations Between Domestic Firms and Foreign Officials. In light of these obstacles to transatlantic cooperation in trade litigation, private firms often take the lead in initiating cooperative strategies. With transatlantic direct investment totaling around \$700 billion dollars, and with U.S. subsidiaries in Europe and European subsidiaries in the United States accounting for over one-third of transatlantic trade,³¹¹ large firms have interests that are far from being purely "domestic." The chemical industry, for example, consists of a limited

³⁰⁸ Interview with representative of the U.S. spirits industry trade association, DISCUS (May 1999).

³⁰⁹ Prince interview, *supra* note _____. It has also been stated that U.S. trade negotiations have been hampered by the USTR's failure to retain experienced trade personnel. Remarks of former USTR Robert Strauss quoted in U.S. Congress, Senate Committee on Finance, Trade Agreements Act of 1979, 96th Cong., 1st Sess. (17 July 1979), S. Rept. 96-249-69 (cited in Ian Destler, *AMERICAN TRADE POLITICS* 16 (3rd ed. 1995)).

³¹⁰ As mentioned earlier, the Washington DC revolving door provides personal incentives to USTR officials and members of the trade bar to form closer public-private partnerships. *See supra* notes ____.

³¹¹ *See* Mark Pollack and Gregory Shaffer, *Transatlantic Governance in Historical and Theoretical Perspective*, *supra* note ___, at . - up date fdi figure

number of large firms on both sides of the Atlantic with huge cross-border investments.³¹² Firms with multinational investments by definition do not have a purely American or European identity or interest.³¹³

Since 1995, the primary business forum for providing “a common meeting ground” for U.S. and EC officials has been the Transatlantic Business Dialogue (TABD).³¹⁴ Not surprisingly, the TABD consists solely of large corporations with transatlantic interests. While the TABD was first created through the initiative of the U.S. Department of Commerce and the European Commission, and while it aims to be “CEO-driven,” TABD has stimulated a “bottom-up, pragmatic approach” to transatlantic trade negotiations by incorporating the views of firms and trade associations on both sides of the Atlantic.³¹⁵ The TABD, however, has become more than just a channel of information for U.S. and EC authorities, as TABD representatives sometimes have gained a seat at the negotiating table over transatlantic matters, again highlighting the benefits offered to larger transnational corporations in a globalizing context.³¹⁶

TABD and other cross-sectoral associations, nonetheless, play a relatively insignificant role in challenging trade barriers under WTO agreements, since challenges involve relatively technical matters affecting specific firms and industries. Firms rather coordinate challenges on an *ad hoc* basis. They typically start with their home governments and coordinate their efforts with their transatlantic

³¹² **Get figures and number of major firms-** see CEFIC

³¹³ *See e.g.* ROBERT REICH, *THE WORK OF NATIONS* 153 (1991) (claiming that “corporate nationality is becoming irrelevant”). **Add cites pro and con**

³¹⁴ *Maria Green Cowles, The Transatlantic Business Dialogue: Transforming the New Transatlantic Dialogue*, in *TRANSATLANTIC GOVERNANCE IN A GLOBAL ECONOMY* (Mark Pollack and Gregory Shaffer, eds.) 213 (2001). Coordinated transatlantic lobbying is not limited to TABD. National chambers of commerce work through the International Chamber of Commerce (ICC) on international matters, with the United States Council on International Business (USCIB) being the peak U.S. organization and EUROCHAMBRES being the peak European representative. However, one of the reasons that the Department of Commerce and Commission created TABD was because they believed that these networks were ineffective. The United States, in particular, felt that European firms were insufficiently involved in EU policy-making during the Uruguay Round negotiations. *Id.*, at 218, 225.

³¹⁵ *Maria Green Cowles, The Transatlantic Business Dialogue*, *supra* note __, at 217-221, 226-228.

³¹⁶ *See Maria Green Cowles, The Transatlantic Business Dialogue*, *supra* note __, at 216 (“TABD has become at times a ‘quadrilateral forum’ in which the US and EU governments, regulatory bodies, and businesses sit down to discuss and ‘negotiate’ regulatory matters.”).

business counterparts. For example, DISCUS, the association of U.S. producers of spirits, worked with the European-based Scotch Whiskey Association to coordinate U.S. and EC positions in the Korean alcohol case following the U.S.-EC spat in the case against Japan.³¹⁷

Where intergovernmental cooperation stalls, firms may bypass their own governments and cultivate direct links with public authorities in other jurisdictions, forming cross-border public-private partnerships. This is particularly the case with U.S. firms who are typically more aggressive for reasons discussed earlier. Most U.S.-based multinationals and many U.S. trade associations operate government affairs offices in Brussels. They lobby the Commission directly, bypassing the USTR. Commission officials report that representatives from PhRMA, the U.S. pharmaceutical trade association, contact them about as often as PhRMA's European counterpart.³¹⁸ When Argentina implemented safeguard measures against footwear imports, Nike representatives met with Commission officials to both learn how the EC was planning to react and to persuade the Commission that it had a strong legal and factual case to pursue.³¹⁹ This followed Nike's lobbying of the USTR to bring a successful WTO challenge against Argentina's discriminatory taxes on shoe imports.³²⁰ Both the United States and EC brought back-to-back complaints against Argentina even though Nike and the European shoe giant Adidas produced their shoes in Indonesia, not in the United States or Europe.³²¹ In short, private firms are interested in outcomes, and will form cross-national public-private partnerships if they promise to expand such firms' export sales.

Domestic private firms may also discretely assist foreign governments to challenge domestic regulations that they desire removed. Importers of foreign products always benefit from WTO challenges. They sometimes visit Brussels or Washington to help develop a case that they cannot

³¹⁷ See SWA Remarks, *supra* note __ (“It also involved coordinating with friendly foreign spirits industry groups such as DISCUS in the United States and the ACD in Canada with the result that both the United States and Canada acted as co-complainants with the European Union.”). Confirmed in DISCUS Interview, *supra* note __.

³¹⁸ Interview with a Commission official in DGI working on intellectual property matters (June 1999).

³¹⁹ Interview with Commission official in Market Access Unit of DGI (June 1999).

³²⁰ Cite from bna recase.

³²¹ For some background on this case, see *U.S. to Back Possible EU Case against Argentine Footwear Duties*, INSIDE U.S. TRADE, May 1, 1998, at 11.

otherwise bring before domestic courts.³²² Similarly, domestic producers benefit from WTO challenges to domestic legislation that they could not block through the domestic political process. Even the intellectual property industry, which has successfully worked with U.S. and EC trade authorities to press foreign countries to enforce new intellectual property protections, assists in U.S. and EC challenges to each other's domestic intellectual property laws. The EC copyright industry, for example, benefitted when the United States initiated formal WTO consultations against Ireland, Denmark and Sweden over the adequacy of their copyright protection and enforcement procedures. Without the U.S. challenges, changes in EC member state practice would have been delayed for years.³²³ Portugal did not even offer patent protection until the United States asked for formal WTO consultations against it.³²⁴ Similarly, in the United States, the trade association for the restaurant and bar industry successfully lobbied Congress for exemptions from paying music royalties, to the detriment of music copyright associations, whether based in the United States or Europe. The European Commission, in challenging the relevant U.S. legislation, met and corresponded with representatives of the U.S. music rights associations BMI and ASCAP. BMI also engaged a U.S. law firm to assist the EC in its case.³²⁵ The European Commission and U.S. private association were not formal partners, but they did have reciprocal—although not identical—interests. The U.S. private association provided information that was useful to the EC's case.

V. Conclusion: Public-Private Partnerships and the *Indirect* Effects of WTO Law

As WTO case law develops, firms and associations increasingly work with the USTR and European Commission to threaten WTO claims against foreign governments that restrict market access, driving the trade liberalization process forward. Yet this indirect effect of the WTO system is nonetheless significantly constrained compared to a system promoted by many supporters of liberalized trade, under which private firms could directly invoke WTO rules before national

³²² See discussion concerning the lack of direct effect of WTO agreements, *supra* note ____.

³²³ Interview with Commission official (June 1999).

³²⁴ Cite re consultations/case in bna

³²⁵ Interview with Commission official (June 1999).

courts.³²⁶

Some proponents of a liberal trading order maintain that the WTO system should be viewed less as an international treaty than as a new world trade “constitution.”³²⁷ Under this vision, private parties would be granted trading rights so that enterprises could act as private attorneys general to ensure the effectiveness of WTO rules, just as is the case under the dormant commerce clause of the U.S. Constitution and Article 28 of the Treaty Establishing the European Community.³²⁸ These commentators would like the United States to go further than representing “clients” before WTO bodies. They would like the United States to promote the right of firms to invoke directly WTO rules in national courts-- whether domestic or foreign-- without a government intermediary or government interference.

Yet, private parties do not have the right to invoke WTO rules under internal U.S. or EC law. Rather, only governments have the right to invoke WTO rules before WTO dispute settlement panels. Thus, at first glance, the world trading order appears to remain a state-dominated system. However, now that the WTO includes a more effective dispute settlement system, public authorities negotiate trade claims with greater leverage. They negotiate claims on behalf of private enterprises within the shadow of the WTO dispute settlement system and its growing case law. While WTO

³²⁶ Trade liberals maintain that the defense of private trading rights should be the trading system’s driving normative goal. Trade liberals assert that the WTO system is currently insufficient because it does not require that member states permit commercial and consumer interests to directly invoke WTO rules before member state courts. See Ronald Brand, *GATT and United States Trade Law: The Incomplete Implementation of Comparative Advantage Theory*, 2 J. LEGAL ECON. 95, 95-102 (1992); Ernst-Ulrich Petersmann, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW 243, 463 (1991) (asserting that lawyers should “recognize freedom of trade as a basic individual right”). See also, Symposium, *Journal of World Trade Law* (1998).

³²⁷ See e.g., John McGinnis & Mark Movsian, *The World Trade Constitution: Reinforcing Democracy Through Trade*, 114 HARV. L. REV. 511 (2000); Petersmann, *supra* note __.

³²⁸ Until the EC Treaty was renumbered by the Treaty of Amsterdam, Article 28 was formerly Article 30. The article prohibits “quantitative restrictions on imports and all measures having equivalent effect.” The term *self-executing* is used in U.S. law and the term *direct effect* in EC law to denote provisions of supranational law that have direct legal effect in national law, so that they become part of, and may be invoked under, domestic law. The question of a provision’s direct effect is often divided into two sub-issues, one regarding the direct applicability of supranational law in the domestic setting, and the other involving standing (i.e., who may claim the benefit of the directly applicable provision). For example, Article 28 of the EC Treaty has “direct effect” in all EC member states and can be invoked by private parties before member state courts.

rules may not have direct effect in the United States, EC or other WTO members, the *ad hoc* partnerships formed between public authorities and private enterprises permit WTO rules to be given a form of *indirect* direct effect.

As U.S. and European businesses become more aware of WTO rules and “successful” WTO case outcomes,³²⁹ they increasingly use the relevant domestic mechanisms-- such as U.S. Section 301, Special 301, Article 133 and the TBR-- to drive the trade liberalization process forward.³³⁰ The WTO system’s legalization enhances certainty; this certainty improves the odds of a profitable outcome; potential profits stimulate enterprises to more actively engage the process. In this way, the WTO promotes a liberal model under which private enterprises play an active, albeit indirect, role in litigation and negotiation over regulatory barriers. In practice, the WTO system is much more than an intergovernmental system dominated by diplomats negotiating in the national interest behind closed doors. While there remains a governmental screen between the private interest at stake and the actual bringing of a trade dispute by a government, that screen has become more porous.

The development of public-private partnerships in the United States and Europe to address international trade claims is a rational response to a more legalized international trading system. Successful use of the intergovernmental WTO process requires a collaboration between private commercial interests and public officials to press for the enforcement of WTO obligations. WTO legal rights affect company and industry-specific interests. Details of market shares and legal arguments are the province of business executives and legal advocates, not state-- or more remote Community-- diplomats. To litigate efficiently in the WTO system, government officials increasingly realize that they need the specific information that business and legal representatives can provide. They therefore strive to establish better working relations with industry on trade matters. In short, a modified international trading structure has provided new incentives for well-

³²⁹ By successful, I refer to cases in which a WTO panel finds that a foreign regulation constitutes a trade barrier in violation of WTO rules *and* the foreign government agrees to annul or amend the regulation to permit the effective importation of the goods or services in question.

³³⁰ As Tim Jackson of the Scotch Whiskey Association stated following the EC’s successful WTO challenge of Japan’s tax system applied to European spirits, “Importantly a key point for us as an exporting industry is that our ‘win’ gives us moral and legal leverage over other offending countries which will now be obliged to take the unpopular steps necessary to ensure a fair taxation system for the spirits sector.” SWA Remarks, *supra* note __.

placed actors to engage legal processes.

As in most litigation situations, given the financial demands and legal and factual complexity of bringing a successful complaint, large and well-organized interests are best positioned to avail themselves of new legal rights through hiring lawyers, economists and other legal consultants. Shifting litigation to the international level exacerbates the imbalance. The legal forum is distant. Legal expertise is less widespread and thus more expensive. The political process is more complex. While many WTO critics crudely and inaccurately characterize the WTO as a system designed to benefit footloose multinational firms,³³¹ it remains true that multinational firms are typically best informed and most likely to make use of international trading rights. This is the case because multinational firms have *high per capita stakes* in the outcome of international trade disputes. They are the world's largest traders and consequently the most directly affected by the details and interpretive nuances of agreed rules.³³² They thus have the incentive to inform themselves, organize and generally play an active role.³³³ They also have the resources to engage in complex, prolonged litigation in a remote forum, which they are willing to dedicate to these issues because of their stakes.

Small and medium-size enterprises, on average, have lower per capita stakes and thus reduced incentives to engage the process. The costs of informing themselves of the issues and organizing to have their views represented outweigh the potential, but uncertain, benefits of pursuing their interests through international trade litigation. Moreover, public officials have limited resources

³³¹ See e.g. *Invisible Government*, N.Y. TIMES, Nov. 29, 1999, at A15 (advertisement criticizing the WTO as being a global government that operates in secrecy and undermines the constitutional rights of sovereign nations).

³³² For example, in the early 1980's, approximately forty percent of global trade was intrafirm trade conducted by 350 of the world's largest multinational corporations. See World Bank, *GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES* (1992). The same holds true today. See Edward M. Graham, *GLOBAL CORPORATIONS AND NATIONAL GOVERNMENTS* 14 (1996) (stating that intrafirm trade of multinational corporations with their affiliates accounted for about one-third of world trade and around 50% of U.S. imports and exports).

³³³ See discussion of the role of high per capita stakes in explaining firm activity in new transatlantic governance mechanisms, in Pollack and Shaffer, *Who Governs?*, *supra* note __, at __. See also Komesar, *supra* note __, at 8, 68 (maintaining, "The character of institutional participation is determined by the interaction between the benefits of that participation and the costs of that participation.... Interest groups with small numbers but high per capita stakes have significant advantages in political action over interest groups with large numbers and smaller per capita stakes.")

to help them overcome collective action barriers. Public officials can create databases and file a few publicized cases, but overall, large and well-organized interests remain best situated to exploit the process.

Nonetheless, as examined above, there are differences in the bringing of trade claims in the United States and Europe, in particular in respect of firm reflexes, bureaucratic responsiveness and political processes. What impact do these U.S.-EC differences have in the bringing of trade claims? A response must be forwarded with caution since public-private relations at the EC-level are converging somewhat toward those in the United States. Nonetheless, because of the stronger public-private partnerships in the United States, the USTR tends to receive better prepared complaints.³³⁴ The EC's legal services division has to work largely on its own, while the private sector often brings to the USTR extensively-researched cases. Members of the Washington trade bar, often former USTR officials, gather detailed facts from company personnel and present them in briefs for current USTR lawyers to pluck, preen or adopt wholesale.

Moreover, since industry brings cases to the USTR as opposed to the USTR self-initiating them, U.S. claims tend, on average, to be of greater commercial significance for specific firms. The European Commission, in contrast, has initiated a series of WTO claims concerning third countries' use of safeguard procedures and taxes on raw hide exports that are of less immediate commercial significance.³³⁵ The Commission also has brought a series of complaints following reports from outside professional consultants that it hires.³³⁶ The Commission brings these cases, in the words of a number of Commission interviewees, on "principle," and for "systemic reasons," to ensure the proper implementation of WTO agreements. The initiative is again taken by the Commission, not industry. U.S. firms and producer associations, in contrast, actively lobby for an aggressive U.S.

³³⁴ This was confirmed by present and former members of the Commission's Legal Services division. Interviews (Brussels, June 1999).

³³⁵ See supra note ____ One member of the Commission's Legal Services division questioned why these cases needed to be brought given the time and cost required for the EC to litigate them compared to the relatively minor economic impact on EC enterprises. Interview in Brussels, June 1999.

³³⁶ These reports have identified barriers around the world in specific sectors, such as the leather sector and the textile sector. A number of these cases were brought to demonstrate to industry that the Commission's TBR unit, as well as other units desire to work for it. As EC industry develops a reflex to bring cases to the Commission, the need for these consultant reports and TBR test cases may diminish.

stance in the banana and meat hormones cases not on “principle,” but for profit. They wish to expand lucrative European market shares.

The United States, with its tradition of intensive private sector lobbying, its long experience with Section 301 collaborations, its revolving door political culture, and its comparative advantage in lawyering, has used public-private partnerships in the litigation of WTO claims more effectively than any other WTO member.³³⁷ While some criticize U.S. trade policy as being captured by private interests, U.S. style public-private partnerships also ensure more effective enforcement of WTO rules.³³⁸ Ultimately, WTO rule violations affect individual firms and industries. Those firms and industries most likely know the factual details of violations and best judge their commercial significance. If one believes in the appropriateness of legal trading rights to open commerce across borders, public-private partnerships should be expanded, not curtailed. Although firms may pursue their own self-interests via public-private partnerships in international trade litigation, their engagement may also give rise to public benefits (or in the language of economics, positive

³³⁷ Robert Hudec has pointed out that, in the 1960s, U.S. business complained that European enterprises were better informed than they of governmental negotiating positions and trade complaints. This could be attributed to the control by the U.S. Department of State of trade policy during the height of the Cold War (*see supra* note __), of a desire to shield U.S. trade policy from Congressional protectionist pressures, as well as by the fact that many affected European firms were government-controlled and considered arms of European industrial policy. Conversation with Hudec at ASIL International Economic Law Group conference in Houston, March 2001. Hudec worked at the USTR during the negotiation of the Kennedy Round in the 1960s. He noted that the USTR became more open with Congress and with firms after John Jackson came to the then-named STR as its General Counsel. After Congress refused to approve the Kennedy Round anti-dumping code, the USTR apparently believed that it would be more successful if it worked with Congress, rather than trying to keep it in the dark. *See also* Destler, AMERICAN TRADE POLITICS, *supra* note __, at 71-72.

³³⁸ *See* Ostry, GOVERNMENTS AND CORPORATIONS, *supra* note __, at 30 and 43 (concerning U.S. unilateralism, bilateralism, and the privatization of U.S. trade policy). Yet, while Ostry critiques Section 301 as a form of “bilateralism,” bilateral negotiations and multilateral rules are not necessarily in contradiction. Bilateral negotiations pursuant to Section 301 are conducted in the shadow of the WTO multilateral dispute settlement system. WTO rules will only be effectively implemented if pressure is placed on the offending country to change its practices. In this sense, Section 301 is not a “new form of protectionism” as Ostry claims, nor is the EC Trade Barrier Regulation, as the Germans first feared. Rather, Section 301 and the EC Trade Barrier Regulation can be viewed as processes through which quasi-private attorney generals oversee the enforcement of agreed multilateral rules.

In respect of domestic policymaking, Mancur Olson also critiques the pervasiveness of lobbying and the resultant capture of government policy by private interests in the United States. He finds them to be factors leading to U.S. stagnation and relative decline. *See* Mancur Olson, THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION AND SOCIAL RIGIDITIES (1982). However, where lobbying is keyed to a challenge of foreign special interest legislation, then arguably the modification of such special interest legislation, under Olson’s analysis, can enhance domestic and foreign economic efficiency.

externalities). Under this view, public-private partnerships in the United States are a model for successful implementation of WTO law.

If, on the contrary, one opposes or is skeptical of trade liberalization endeavors, one will only be more wary of the input of large and well-organized commercial interests working the system through coordinating strategies with government officials. Partnerships between the world's dominant economic powers and the world's largest private commercial enterprises justifiably exacerbate these concerns. Just as in domestic litigation, the haves more likely come out ahead at the international level.³³⁹ Even if one supports trade liberalization, one may be concerned about issues of accountability and appropriate public steering of these networks so that they pursue public, and not just private, ends.³⁴⁰

To return to this article's opening thrust, with the creation of the WTO, an area of international law may have become more like law as we commonly perceive it. Yet, it is not the neutral technocratic process some of its proponents idealize it to be. Those who support the creation of international trading rights need be cognizant of how they will be used—that is, of the *law-in-action*. And yet, forsaking such law will not rid the world of systemic biases either. As always, the choice is among imperfect alternatives.³⁴¹

³³⁹ Cf. Galanter, *Why the Haves Come Out Ahead*, *supra* note ____.

³⁴⁰ See e.g. discussion in Rhodes, *THE NEW GOVERNANCE*, *supra* note ___, at 661, 666. This is particularly a concern as regards implementation of the TRIPs Agreement in developing countries. For a study of the impact of the TRIPs Agreement on India, see, e.g., Jayashree Watal, *Pharmaceutical Patents, Prices and Welfare Losses: Policy Options for India Under the WTO TRIPs Agreement*, 23 *WORLD ECONOMY* 733 (2000) (noting “that prices are likely to increase and welfare likely to decrease” in India). See also, Keith Maskus, *Intellectual Property Issues for the New Round*, in *THE WTO AFTER SEATTLE* 137, 142 (Jeffrey Scott ed., 2000) (noting an estimate of “static risk transfers... of some \$5.8 billion per year” to the United States, and “a net outward transfer of around \$1.2 billion per year” for Brazil); and Alan Deardorff, *Should Patent Protection Be Extended to All Developing Countries?* 13 *WORLD ECONOMY* 497, 507 (1990) (“patent protection is almost certain to redistribute welfare away from developing countries”).

³⁴¹ The phrase imperfect alternatives is used by Neil Komesar in the title of his book *IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY* (1994) (a book calling for assessment of policy in terms of its likely handling by alternative institutions-- be they courts, legislatures or markets-- in which different parties will be better, or less well, represented). As Komesar notes, all institutions are imperfect. The key issue is which alternative is relatively less imperfect. Given systemic biases of the WTO judicial system toward the wealthy and politically connected, one obvious alternative is to curtail cross-border trading rights, resulting in more closed economies throughout the world. This would, however, arguably reduce aggregate national welfare in developed as well as developing countries. It would also not eliminate coercive political and economic

While accepting the welfare-enhancing goals of an open trade regime, this article addresses the actual use of the rights created, laying the groundwork for better assessing the alternatives for ensuring broader participation in the attainment of an open trade regime's goals, while safeguarding social choices made by local constituents. Legal scholars need to address mechanisms that can be developed both at the national and international levels to attempt to offset the biases in the current system. These measures could include the provision of financial assistance to developing countries, which has a prototype in the new WTO Advisory Center in Geneva.³⁴² They also could include modifications of WTO remedies and procedures. Yet, this is the subject of a subsequent article. The purpose of this article has been to more transparently present how the WTO dispute system operates in practice in order to set the groundwork for subsequent analyses of potential modifications that, were their political will, could be implemented.

pressures, but rather could exacerbate them.

³⁴² See Kim Van der Borght, *The Advisory Center on WTO Law: Advancing Fairness and Equality*, 1 J. INT'L ECON. L. 723 (1999). The Advisory Center is to provide legal services to developing countries in WTO litigation at reduced rates. The Center is funded through an endowment and user fees, the fees being imposed on a sliding scale in relation to the country's pro rata share of global trade and its per capita gross national product.