

**PUBLIC-PRIVATE PARTNERSHIPS:
MECHANISMS FOR THE NEGOTIATION OF INTERNATIONAL TRADE
CLAIMS BY PUBLIC AUTHORITIES ON BEHALF OF PRIVATE ENTERPRISES
IN THE UNITED STATES AND THE EUROPEAN UNION**

By Gregory Shaffer¹

This chapter examines the mechanisms used in the United States and the European Union (EU)² pursuant to which private firms and governmental authorities collaborate to challenge foreign trade barriers.³ 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. International trade disputes are, in consequence, not purely “intergovernmental.”⁴ Nor do they reflect a simple co-optation by businesses, particularly large and well-organized businesses, of government officials. Rather, they involve, in the terminology of this chapter, the formation of public-private partnerships to pursue varying, but complementary goals. This chapter focuses on developments in these public-private partnerships from 1995, with the creation of the World Trade Organization (WTO) and the signature of the New Transatlantic Agenda, through mid-1999, with the United States’ retaliation against the EU for failure to comply with the WTO panel rulings in the two controversial trade disputes entitled EC-Regime for the Importation, Sale and Distribution of

¹Assistant Professor of Law, University of Wisconsin Law School, Madison. **This is a work-in-progress which requires further field research to be conducted this summer. I welcome all comments, which can be forwarded to me at gshaffer@facstaff.wisc.edu.** An earlier version of this paper which focused only on the EU, entitled *Mechanisms for the Negotiation of International Trade Claims by Public Authorities on Behalf of Private Enterprises in the European Union: A Public-Private Partnership*, was presented at the annual conference of the American Society of International Law in April 1998.

² The terms EU and EC are used interchangeably in this book. See footnote __ of introduction.

³*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 Bhagwati.

⁴ Refer to definition of “intergovernmental” in introduction.

Bananas (EC Bananas case) and EC-Measures Affecting Meat and Meat Products (EC Meat Hormones case).

The development of this public-private partnership is seen in the actual handling (the “law in action”⁵) of most commercial trade disputes, as opposed to the law in the books reflected in the relevant provisions of US statutes, EU regulations and the Treaty of Rome. The growing interaction between private enterprises and US and EU public representatives in the bringing of most trade claims reflects a trend from predominantly intergovernmental decision-making toward multilevel governance involving direct public-private exchange at the national and “supranational” levels. Given the trade-liberalizing rules of the WTO, 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.⁶

The chapter is divided into three parts. Part I examines mechanisms used in the United States for private firms to work with the Office of the United States Trade Representative (USTR) to challenge foreign trade barriers. It addresses, in particular, how the USTR and private firms use the “Section 301” and “Special 301” processes-- pursuant to which the USTR identifies, investigates and takes action against foreign trade barriers-- to ratchet up pressure on foreign countries in order to expand access to their markets.⁷ Part II examines the relevant mechanisms used in the European

⁵ This work-in-progress’ findings are based on interviews with representatives (and former representatives) of the USTR and other US agencies, the European Commission, EU 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 chapter. The interviews complemented a review of relevant public documentation concerning the relevant US and EC procedures for challenging foreign trade barriers.

⁶ This is often 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.

⁷ 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 US rights under an agreement or otherwise are “unfair” and restrict US 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 US persons, triggering the Section 301 process. See further discussion in Parts I.A and B below.

Union, in particular the intergovernmental article 113 process (pursuant to which the EU Member States form a “common commercial policy”) and the EU’s trade barrier regulation (the EU’s analogue-- and response-- to the United States’ Section 301 procedure). Part III assesses the extent to which US and EU private firms and trade representatives coordinate their efforts to challenge foreign trade barriers, and the factors that constrain their cooperation.

I. The Public-Private Partnership in the United States for Opening Foreign Markets

Much has been written on Section 301 from a legal and normative perspective-- that is, from the perspectives of what the law says and whether it is a good or bad law for attaining multilateral trade liberalization goals (Bhagwati & Hugh 1990, Sykes 1992, Bayard & Elliot 1994). The first two sections of this chapter briefly recall the rationale of Section 301 and its siblings-- an effort to force the executive to work with private enterprises to defend their export interests (Part A), and the legal criteria for Section 301’s implementation (Part B). This sets up an assessment of how the mechanisms are actually used in practice by private firms and public officials, through the formation of *ad hoc* public-private partnerships, to challenge foreign trade barriers (Part C).

The chapter then assesses the impact of the WTO system on the use of the Section 301 mechanisms, in particular in terms of the normalization of the process for bringing international trade claims, the greater demands on those wishing to bring claims in light of the system’s legalization, the relative constraints on US unilateralism, and the broader scope of claims that may be brought under WTO rules (Part D). Part I demonstrates that the two most important aspects for private firms and public authorities of the public-private partnership are:

- (i) an intensive *exchange of information* between private firms and public representatives throughout the process, from the identification of trade barriers through the litigation of claims before the WTO’s dispute settlement system; and
- (ii) the *strategic use of deadlines* to steadily ratchet up pressure on foreign countries before bringing a WTO claim or imposing other sanctions (Part E).

A. Initial Rationale and Impact of Section 301: The Forging of a Public-Private Partnership.

Sections 301-310 of the Trade Act of 1974 set forth a procedure pursuant to which the USTR is to

investigate and take action against foreign trade barriers, including in response to a petition filed by a private firm or trade association.⁸ Section 301's immediate predecessor was Section 252 of the Trade Expansions Act of 1962 which was enacted in response to the EC's Common Agricultural Policy, and authorized retaliation against unjustifiable foreign restrictions on US agricultural imports. Section 252 was used only twice, once against the EC in response to EC variable tariffs on chicken exports, leading to the US-EC "chicken war," and once against Canada in response to Canadian restrictions on US meat imports (Hudec 1975). Section 301 expanded the focus of Section 252 to trade in all goods, as well as services "associated with" trade. Congress, in turn, amended Section 301 in 1979, 1984, 1988 and 1994, so that, over time, Section 301's scope of coverage was broadened to include trade in services, foreign investment and intellectual property protection. The amended provisions also tightened the requirements on the US executive, by establishing narrower deadlines and limiting the President's discretion.

The impetus for Section 301 and its successive amendments, in particular those in 1984 and 1988, was Congress' view that US markets were more open for foreign firms than were foreign markets for US firms. Congress demanded reciprocity. In addition, increasingly in the 1980s, Congress felt that international trade rules were not sufficiently broad to cover areas of mounting importance to US industry, in particular to firms in the services sector and firms relying on intellectual property rights (Destler 1995, Bayard & Elliot 1994, Low 1993).

Yet this was only part of the reason. Private firms found it difficult to use the Section 301 process because of countervailing pressures from departments in the executive branch that promoted Cold War foreign policy goals over the goal of expanding foreign market access. They viewed the Department of State, which coordinated US trade policy through the 1950s, as a particular problem. They successfully lobbied Congress to first create the USTR in 1962 (originally named the State Trade Representative or STR), 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

⁸ The relevant provisions of the Trade Act of 1974, as amended, may be found at 19 U.S.C. §§ 2411-2420.

USTR.⁹ Through these changes, firms and their Congressional allies hoped to shift power in interagency deliberations from those agencies that focused on non-export goals (such as State, Treasury, Defense and the National Security Council) to those more likely to defend a firm's export interests (such as the USTR, and on agricultural matters, the Department of Agriculture).

In creating a more automatic Section 301 process, Congress attempted to make the executive more "accountable," not only to Congress, but to industry. Industries became, in this sense, the USTR's "clients." Yet because the USTR and industry have similar-- but not identical-- interests, and because they must rely on each other to successfully challenge trade barriers and to further trade goals within the administration, the USTR has worked with industry more as a partner than as a client. By constraining executive discretion through successive amendments to the Section 301 process, Congress has, over time, fostered this public-private partnership between the USTR and the private sector.

The relationship of the USTR and the private sector is a reciprocal one. Although their interests are not identical, they overlap. On the one hand, in order to obtain support in Congress and the administration for adopting USTR policy goals and supporting USTR practical needs, from the granting of fast-track negotiating authority to the allocation of budgetary funds, the USTR depends on private sector lobbying for support. In particular, the USTR depends on export-oriented industries to have their employees and management write, call or otherwise lobby local Congressional representatives to support USTR's positions. Accordingly, following the USTR's successful litigation on behalf of the US 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) 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

⁹ The USTR's decisions, however, remained "subject to the specific direction, if any, of the President." (*See* Section 301(a) of the 1974 Trade Act (as amended)). 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.

system” (Congressional Record 1999).

On the other hand, the USTR repays industry through taking an aggressive stance in defending industry’s interests, be it in multilateral or bilateral trade negotiations, WTO accession negotiations (as with China), or litigations before the WTO dispute settlement system. Industries also rely on the USTR’s access to the President to have their views heard when the President must balance multiple US interests. When the process is successful, the President may expressly promote an issue on industry’s behalf at the highest level, as was the case when President Clinton raised pharmaceutical patent protection issues during his [1999] visit with Nelson Mandela in South Africa.

Because the United States aggressively defends commercial interests in bilateral and multilateral fora, it is sometimes critiqued for being the tool of powerful business interests. Sylvia Ostry, a trade law professor at the University of Toronto, for example, was widely quoted when she maintained, “The United States does not have a trade policy. It has clients” (Economist 1999). Ostry’s remarks imply that US interests are up for sale to the highest bidder, in particular to those who supply campaign funds to the President and key members of Congress. The controlling shareholder of the Chiquita banana company, for example, was among the top three contributors to the democratic and republican parties in 1998. Under this scenario, if business is the USTR’s client, then campaign funds and related forms of consideration are its legal fees.

Trade liberals, however, 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 (Brand 1993, Petersmann in chapter 2). They 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 directly invoke WTO rules in national courts-- whether domestic or foreign.

The USTR certainly furthers commercial interests by bringing WTO claims-- whether by promoting Chiquita’s bananas, Kodak’s film or cattlemen’s beef. As WTO case law develops, these firms and associations increasingly work with the USTR 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 significantly more constrained than would be a system under

which firms could directly invoke WTO rules before national courts without a government intermediary or government interference.

Under the current international system, the relation of US private interests and public authorities is neither as Ostry maintains (that of lawyer-client) nor as trade liberals would prefer (that of firms acting independently of government). Rather the relationship is a hybrid, involving not a lawyer-client relationship, but a public-private partnership. In bringing a case under WTO rules, the USTR does not assume the traditional role of private counsel 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 the “client” firm. The USTR must consider potential cases in which other US interests need be defended. Cases involving food and drug standards and antidumping procedures, to give just two examples, inherently raise these conflicts. 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. Despite what Ostry suggests, 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.

B. Overview of Section 301: The Law in the Books. Section 301 sets forth four criteria that the USTR must assess in determining whether to bring a WTO claim or retaliate in response to a foreign country act or practice that restricts US exports. Two of these grounds are listed under a section entitled “mandatory action” (Section 301(a)) and two under a section entitled “discretionary action” (Section 301(b)). The grounds for mandatory action concern the violation of the provisions of “any trade agreement” and, more generally, of “the international legal rights of the United States.” In practice, at least as regards any of the WTO’s [134] members, these grounds should normally be based on alleged violations of one of the WTO’s [19] substantive trade agreements.¹⁰ In addition,

¹⁰ Earlier Section 301 cases were brought on account of an alleged violation of bilateral agreements, often entitled Friendship, Navigation and Commerce Agreements (Bhala 1998). However, as discussed in Part I.D below, the WTO Dispute Settlement Understanding constrains US unilateral retaliation under bilateral agreements to the extent the retaliation violates a WTO rule.

the USTR has the discretion to take action where a foreign practice is “unreasonable” or “discriminatory and “restricts United States commerce.” These vague terms have been used since the original 1974 version of Section 301, but were not defined until 1984. In 1988, the definition of “unreasonableness” 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...,

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

(iii) a persistent pattern of conduct that... denies worker rights of association...” and a list of other labor rights.

These “discretionary” grounds are more controversial because they can lead to retaliation even if the foreign practice does not constitute a “violation” of a trade agreement or any other “international legal right.”

Under Congressional pressure to do something about the United States’ growing trade deficit, in particular with respect to Japan, the Reagan administration agreed in 1988 to adopt two new mechanisms as part of the Section 301 process, known as Special 301 and Super 301. 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.” 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.”¹¹ Although Special 301 only calls for the USTR to designate priority foreign countries, the administration developed a sliding scale whereby relevant countries could be placed in one of three categories: priority foreign countries, those on a “priority watch list,” and those on a “watch list.” The USTR created a similar sliding scale when it

¹¹ While Special 301 is a definitive part of the Section 301 process, Super 301 was initially created for only a two year period. President Clinton has 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.

implemented Super 301. These changes were made after the USTR consulted with the private sector and received its support (Bello & Homer 1990, 267). As examined below, private firms have attempted to use this system to pressure foreign countries to change their practices.

In making its decision to initiate an investigation, the USTR does not act alone, but rather works through an interagency process. The relevant interagency committees are the "Section 301 committee" and the "Special 301 committee," which bring together representatives from most federal agencies, including the Departments of State, Treasury, Commerce, Defense, Agriculture, 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 the representatives cannot agree on a matter by consensus, they refer it to an interagency committee 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, almost all decisions concerning actions to be taken against foreign trade barriers are made at the 301 and Special 301 committee levels. Where staff require guidance, they obtain it informally from their superiors, avoiding referral to a higher level.

The legal criteria set forth in Section 301 are sufficiently subjective to grant the interagency committee considerable discretion. As former USTR Robert Strauss stated, Section 301 is "mandatory but not compulsory." (Bello & Homer 1990, 59). Even in "mandatory" cases, there is a gaping hole in the Section 301 procedure, since it is for the USTR to decide whether to even commence an investigation.¹² In the twenty-five years that Section 301 has existed, no administrative decision that implements Section 301 has been subjected to judicial review (Bhala 1998). The creation of the WTO and its dispute settlement system, as described below, has further curtailed the unilateral use of Section 301.

As a result, the procedures of Section 301 and its siblings (Special and Super 301) remain primarily political, though subject to indirect WTO legal constraints. A private party's primary

¹² Section 302 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 Registrar."

remedy is to lobby Congressional representatives to pressure the USTR to act, which firms do from the start of the process. Yet firms still need to convince the USTR that they have a strong legal case if the USTR is to bring a WTO complaint. Since the process has both political and legal components, if firms are to successfully challenge foreign market access restrictions, they must learn to work the process with the USTR as a partner, and not as an adversary.

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 can thereby present a united industrial front, maintaining that they represent a broader national interest. They can also more effectively rally political support in Congress where needed.

There are trade associations for 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, the two most important associations are Pharma, representing pharmaceutical manufacturers, and the International Intellectual Property Association, representing associations and constituent firms in the publishing, film, recording and software industries.¹³ Firms also form associations to lobby the USTR over specific foreign practices, as exemplified by the Coalition against Australian Leather Subsidies. The Coalition brought a Section 301 petition in [1996]

¹³ 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 IIPA web site at <http://www.iipa.com>.

challenging Australia's grant of subsidies to its leather industry, a petition which was, in turn, used by the USTR to negotiate Australia's removal of a number of subsidies. Since the negotiation's result was still insufficient for the Coalition, the USTR next brought a WTO case in May 1998 against Australia's remaining subsidies for "automotive leather."

WTO cases increasingly demand significant time, expense and effort. The USTR is unlikely to expend scarce resources and limited political capital within the US interagency process and vis-à-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 (Bello 1997, 357).

2. Exchange of Information. It is insufficient, however, for firms to simply act collectively and garner Congressional backing. To convince USTR to take a case to the WTO, a firm must normally present the USTR with a strong legal case supported by a detailed factual record.¹⁴ 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 and tarnish its reputation before Congress by losing at 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 US (and Kodak) lost the case at a vast expense of resources, leaving the USTR on the defensive when it requests 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 and private firms involving 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,

¹⁴ 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.

the monitoring of compliance with its outcome. The USTR has limited resources, in particular to gather the facts to support a successful WTO litigation. It thus relies on industry assistance. Since US industries, in turn, rely on the USTR to defend their interests within the WTO's intergovernmental dispute settlement system, they are pleased to supply the USTR with whatever it wants and more. Firms are, in many ways, the USTR's eyes. Although US embassies can help compile information, firms know best the market in which they operate or are trying to enter.

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 requesting assistance in identifying and prioritizing foreign trade barriers. 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 the report, the IIPA stresses the loss of high-wage US jobs and billions of dollars of revenue to the US economy (and implicitly, to IIPA's members).¹⁵ In February 1999, for example, the IIPA 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 IIPA's success in presenting the facts is demonstrated by comparing its initial submissions with the ultimate findings in the USTR's Special 301 Reports.

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." To enhance pressure on developing countries to enact and implement more protective copyright laws, IIPA wants USTR to choose cases that it can

¹⁵ See e.g. 16 BNA Int'l Trade Rep. 764 (May 5, 1999) (citing April 29, 1999 testimony of leaders of the US software-industry to the Senate Foreign Relations Subcommittee).

clearly win under the TRIPs Agreement.

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 set up 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 WTO. The debate over the facts involves not only US and foreign governmental representatives, but also US (and sometimes foreign) firms. If the foreign government does not undertake to change its practices or otherwise convince USTR that the US 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 USTR 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 representative on the Section 301 committee, as well as those superiors from whom agency representatives ultimately take their instructions. 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.

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. Defense will not want to compromise its use of air bases in Turkey over complaints about “pirated” Disney videos or Puff Daddy compact disks, no matter how valuable they may be to a US 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.” 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 US foreign

embassy, which, in turn, was obtained from foreign government sources.

The dialogue, in other words, becomes more than an intergovernmental one. It involves private firms debating factual and legal issues with representatives of multiple US 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 US law firm to respond to Kodak's Section 301 petition and, ultimately, to assist it (and Japan) in the WTO "intergovernmental" procedure. The legal fees of both Dewey Ballantine (for Kodak) and Wilkie Farr & Gallagher (for Fuji) are estimated to exceed [US\$10,000,000] in that case. 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 its capacity, through persistent effort, to persuade agency representatives about the facts. Firms work the political process as well, contacting Congressional representatives directly and in coordination with industry associations. Firms press their case to local Congressional representatives and those on the international trade subcommittees of the Finance Committee of the Senate and the Ways and Means Committee of the House of Representatives. Local Congressional representatives, in turn, also engage 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. 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, the President confirmed his undertaking by letter to the Senate Majority Leader and the Speaker of the House.

In the meat hormones case, the beef industry again 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 US Meat Export Association-- orchestrated a country-wide press on the USTR. Since the beef industry has members throughout the country, they were able to have large numbers of Congressional representatives demand action. As one representative at USTR 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 means even more." The threat of draft legislation forcing the USTR to act is perhaps most persuasive.

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 WTO. 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 First Leverage Point: The Publication of Annual Reports. 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 these industry submissions and office visits, backed by Congressional letters, phone calls, questioning before committees and threatened legislation. Each year the reports get longer.¹⁶ 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 US imports" (1999 NTE Report). 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 US 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

¹⁶ 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.

that it would initiate three new WTO cases and one new Section 301 case.¹⁷

The USTR, working with industry, uses the publication of these 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.” 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, the USTR announced upon issuance of its 1999 Special 301 Report that it was filing new WTO complaints against them in respect of their patent laws. The USTR negotiated in a similar fashion with the concerned foreign countries before it published its Super 301 report, when it announced that it would bring new WTO cases against the EU (for French subsidies), India (for local content automobile requirements), and South Korea (for discriminatory restrictions on foreign beef).

¹⁷ In addition, the USTR issues annual reports on government procurement practices and barriers in the telecommunications sector. 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 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 US\$6 billion Incheon International Airport project. See 16 BNA Int’l Trade Rep. 764 (May 5, 1999)

According to representatives of the intellectual property industry, a sign that the system works is that foreign countries now respond to trade association submissions with their own submissions that set forth the reasons that they should not be listed or have their practices challenged or sanctioned. USTR attempts to use this fight over the facts as leverage to press a foreign government to change the facts-- that is, in intellectual property cases, to recognize and enforce US patents and copyrights. 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 (Wolff 1998). What matters to firms is to use whatever levers they have available to change the facts on the ground.

6. The Next Leverage Point: Deadline for USTR Action in Response to Listing a Foreign Country or Practice. Once the USTR agrees to act, it works with private industry to determine how best to use the process's leverage points to have the trade barrier removed. Initiating a Section 301 investigation, for example, requires the USTR to make a "determination" (under Section 304) within six to eighteen months from the date of initiation. This determination can lead to "mandatory action" within thirty days (under Section 305).¹⁸ USTR avoids commencing a Section 301 investigation unless, at the end of the process, the US is 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." USTR wants to be sure that, if the foreign government refuses to make adequate concessions, the USTR has a preconceived plan. Where the foreign country has an important market for US businesses (as does the EC), the USTR knows that unilateral US retaliation could trigger effective counter-retaliation, so that an exit strategy needs to be considered in advance.

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. In practice, the USTR

¹⁸ 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)).

informally investigates a claim before it officially initiates an investigation in order to ensure that it can make effective use of the 301 process. Formally initiating a Section 301 investigation simply triggers a new deadline, and thus leverage point. When the USTR "self-initiates" a Section 301 investigation or accepts a petition, it signals to a foreign country that the US will file a WTO complaint or impose some form of unilateral retaliation if a settlement is not reached by a fixed date.

If the Section 301 process is to work, the USTR and the private firm must act as partners, not antagonists. In the end, the 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. As a result, firms rarely file a petition against the USTR's advice. A sophisticated firm approaches the USTR before submitting its petition. The USTR reviews and comments on drafts before agreeing that a petition 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 third party petitions in the twenty-five year history of Section 301. Rejections are rather indicated informally before a petition is officially filed.¹⁹

Section 301's time deadlines served a greater role before the WTO was formed, since the prior GATT dispute settlement system offered no guaranteed time deadlines of its own. The WTO's Dispute Settlement Understanding, on the other hand, now contains deadlines that 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

¹⁹ The last time that the USTR formally rejected Section 301 petitions 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 US 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 US-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.

the WTO system's internal deadlines, the USTR is more likely to forego a formal Section 301 investigation and directly request consultations before the WTO Dispute Settlement Body. The three most recent cases that the US brought to the WTO in May 1999 did not involve Section 301 investigations.²⁰

Section 301 investigations nonetheless remain useful in many cases. The USTR may initiate a Section 301 investigation to retain pressure on a foreign government, but not yet bring a WTO case. This is an explanation for the Section 301 investigation in the Japan- Photographic Film case (Kodak-Fuji). The USTR wished to drag out the pressure on Japan in the hope that Japan would make concessions to avoid a WTO complaint. In the words of a former chair of the Section 301 committee, the initiation of a Section 301 investigation can be used to attempt "to steadily ratchet up the pressure on a foreign government," in particular where, for strategic reasons, it is determined that filing a WTO complaint is not yet appropriate.²¹

Most importantly, Section 301 investigations remain useful where the USTR determines that it can unilaterally sanction foreign practices. Although the WTO system curtails the use of unilateral sanctions,²² the USTR may still apply them against non-WTO members, as well as against WTO members provided that the sanction does not violate WTO obligations. Intellectual property firms, for example, use the Special 301 process and the annual renewal process of the US General System of Preferences (GSP) to lobby the USTR to remove special tariff preferences granted to developing countries. Firms also lobby for sanctions that exert greater pressure, since the withdraw of GSP benefits on many products is now less threatening because of the overall reduction in tariff rates. In the Argentinian pharmaceutical case, members of the US intellectual property industry suggested that the FDA ban the importation of Argentinian beef on the grounds that it is not free of foot and

²⁰ The USTR rather announced the three claims simultaneously with the publication of its annual Special 301 report. The claims involved alleged violations by the EC, Canada and Argentina of TRIPs Agreement provisions concerning patent protections, all identified to the USTR by the pharmaceutical manufacturers' trade association, Pharma, in its annual Special 301 submission.

²¹ A similar example is the Section 301 investigation initiated in May 1999 following a petition filed by a coalition of Minnesota resort, fishing guides and resort associations against Canadian work permit and related requirements on guided fishing tours.

²² See Part I.D below.

mouth disease. They thereby hoped to coerce Argentina to change its patent law before obligated to do so under the TRIPs Agreement's transition rules for developing countries. As one industry representative noted, "This would have gotten Argentina where it hurts."

7. Litigating before the WTO. 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. As encapsulated in the remarks of one USTR lawyer, "we at USTR rely on industry." Given the number of complicated cases that USTR counsel must litigate, the tight deadlines and the legalization of the proceedings, the USTR increasingly relies on industry for the supply of facts as well as the development of legal arguments. Because of the 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 the filing of a WTO complaint. In the Korea-Alcohol case, 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. 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. When trade lawyers take a matter to the WTO dispute settlement process, they want to be sure to win. To assure victory, the USTR wants a strong committed partner.

WTO cases have become increasingly factually and legally complex. The EC bananas case, for example, involved over a dozen claims under four WTO agreements.²³ 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" (Wolff 1998). As WTO panels increasingly focus on a case-by-case analysis of specific facts as opposed to an application of generic rules,²⁴ the demands on WTO

²³ The relevant WTO Agreements were GATT (1994), GATS, TRIMS, and the Licensing Agreement.

²⁴ Cite AB report in US shrimp-turtle.

complainants and defendants accumulate. Although the USTR still seeks assistance from US embassies, and although embassies may prepare helpful studies, industry representatives are fundamental for the establishment of the factual record. US attorneys involved in the bananas case, for example, maintain that a mark of the United State's success is that the factual description in the WTO panel report was largely taken from the US brief. That US factual description had, in turn, been prepared by Chiquita and its lawyers.

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 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 US industry. In the Korea-Alcohol case, for example, Korea hired a Brussels-based attorney, Marco Bronckers, to defend its interests. According to US industry representatives, Bronckers "threw all sorts of junk at us" in an attempt to demonstrate that Korea's tax system, which taxed whiskey "at ten times the rate" of the rice-based *soju*, was non-discriminatory because (in GATT terms) *soju* was not a competitive or "like product"-- that is, *soju* and US distilled spirits were for different markets. In responding to Korea's defenses on the definition of the relevant Korean market(s) for alcohol products, 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.

There are limits to this public-private cooperation, however. Some firms, and particularly their lawyers, can be overbearing, leading to tensions. The core of this tension is that the USTR

ultimately represents 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 protections, this is less of a problem, since the United States will almost always be a claimant. In antidumping and standards cases, on the other hand, the USTR must be careful not to apply the relevant WTO agreements in a manner that can subsequently be used against the United States. Yet even in copyright cases, US firms want the USTR to take a tougher position. The US, for example, is currently the defendant in a case brought by the EC challenging a provision of US copyright law that exempts the restaurant and bar industry from paying royalties. While the US copyright industry hopes the US loses the case, the US restaurant and bar industry and their allies on Capitol Hill who enacted the exemption demand that the USTR vigorously defend it. Consequently, when bringing copyright claims against third countries under the TRIPs Agreement, the USTR cannot take as aggressive of a position to limit copyright exceptions as the US 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 if they wish to advance their separate, but reciprocal interests.

D. What's New Since the Formation of the WTO. Some commentators argued that the WTO's formation should curtail the use of Section 301. 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 twenty-five year history. According to a former chair of the Section 301 committee, the existence of the WTO has in many ways "simplified" the use of Section 301. Bringing a GATT complaint is now viewed by foreign countries as relatively "normal," and in any case, as less controversial.

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 US may retaliate without the prospect of counter-retaliation. On the other hand, the legalization of the WTO dispute settlement process has made Section 301's use more time-consuming and expensive. As a result, large and well-organized commercial interests predominately use it.

The WTO system has constrained the use of Section 301 for a category of cases that the USTR formerly prosecuted. These cases have the following three characteristics: (i) they involve WTO members; (ii) they involve practices that do not violate a WTO obligation; and (iii) they involve situations where no WTO-legal sanction is available (such as the withdraw of GSP benefits from developing countries). The demise of the United States' unilateral use of Section 301 in these cases occurred in 1995, the year of the WTO's formation, with the dispute over Japan's aftermarket for the replacement of automotive parts. 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 US 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. The constraint of WTO rules on US unilateral action against Japan was reconfirmed in Kodak's Section 301 case filed in 1995. When Japan refused to yield to US 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 WTO, where it lost a panel decision in 1998.

Yet the constraints on this category of cases is, at least in part, 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.²⁵ With these and other

²⁵ The three services-related claims, each filed in 1995, issues were filed in 1995, were related to the EC's banana licensing regime. They expressly or implicitly involved alleged violations of the GATS

claims, USTR will decide, on a case-by-case basis, whether Section 301 may be strategically used to ratchet up pressure before filing a WTO complaint.

E. Conclusion: The Central Roles of Information Exchange and Leverage Points for the Public-Private Partnership. There are two central tools used by the public-private partnerships in the US to eliminate foreign trade barriers. The first is an intensive exchange of information required to successfully challenge a foreign practice and, if necessary, bring a claim before the WTO dispute settlement system. The Special and Super 301 system of annual reports, leading to formal and informal investigations, triggering WTO complaints, relies on information, information that sophisticated firms willingly supply. These firms are repeat players who, over time, learn to work the system in a routinized manner. For the intellectual property industry, Special 301 has been “a huge success,” with countries around the world having adopted and strengthened intellectual property regimes. In the words of an intellectual property lobbyist, “Special 301 is a wonderful process.”

Industry similarly works with public officials to educate foreign governments about complying with WTO obligations. Industry 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 World Intellectual Property Organization (WIPO). The United States regularly sends representatives from the US pharmaceutical and copyright industries to Geneva as “faculty” to educate developing country representatives about intellectual property matters. Firm representatives address intellectual property issues from the perspective of “carrots and sticks.” The carrot is that, through recognizing and enforcing intellectual property rights, a developing country allegedly joins the global economy and improves its economic performance. The stick is that, if developing countries don’t, they will be in violation of WTO rules and face aggressive US claims. Firms do not hesitate to harness US power to their advantage, indicating that the United States can retaliate against developing countries by targeting politically and economically sensitive sectors.

Second, the Section 301 process establishes a series of leverage points to pressure foreign governments to change their policies and practices. The process generates a succession of deadlines,

including the following: (i) the deadline for private submissions of information concerning trade barriers; (ii) the deadline for the publication of the annual Super 301 and Special 301 reports, (iii) the deadline for the identification of countries on watch lists, priority watch lists, as priority foreign countries, and countries with priority foreign practices; (iv) the deadline for initiating and concluding a Section 301 investigation; and (v) the many deadlines in the WTO system for consulting over alleged violations, forming dispute settlement panels, adopting panel decisions and monitoring the implementation of these decisions. The important lever is the deadline, which focuses negotiations between public officials acting on behalf and in coordination with private commercial interests.

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 and thereby drive the trade liberalization process forward. Because of the nature of the public-private partnership, and the complexity and demands of bringing and winning an international trade claim, the process benefits, in particular, the export interests of large firms and well-organized industries.

II. The Public-Private Partnership in the EU

Much of the academic literature concerning policy making in the European Union (EU) has focused on the relative power of the member states and the EU “supranational institutions,” in particular the European Commission and the European Court of Justice (Keohane & Hoffman 1991; Burley & Mattli 1993; and Pollack 1997). While there have been rich studies of private-sector lobbying over EU legislation and standard-setting (Pedler & Van Schedelen 1994; Greenwood 1992), studies of EU foreign trade policy continue to focus primarily on the relation of the European Commission and the member states (Maresceau 1993; Macleod, Hendry & Hyett 1996).

This section addresses how direct input from the private sector to the European Commission plays an increasing role in the EU’s foreign commercial relations. The world trading system provides a framework of rules and a dispute settlement system for their enforcement. Within the context of this system, the European Commission has increasingly and forcefully represented the interests of private enterprises, in part to advance the Commission’s own goals to enhance its authority within the EU and abroad. This has resulted in a mutually advantageous partnership. As enterprises have

learned how to profit from this relationship, they have become more active in the process, working more closely with the Commission to challenge foreign trade barriers and drive the trade liberalization process forward.

This section begins with an overview of the European Commission's new export-oriented "Market Access Strategy" (Part A). It then provides a road map to the alternative mechanisms enterprises use to have EU public officials act on their behalf, in furtherance of the Strategy (Part B). It analyzes how these mechanisms have been used to date and are developing (Part C), assessing their implications for international trade law's implementation (Part D).

A. The Market Access Strategy: Identifying and Challenging Foreign Trade Barriers. In February 1996, the European Commission established a Market Access Strategy whose aim was to make the EU's trade policy proactively focused on opening foreign markets, in particular through the negotiation and enforcement of trade agreements. The essence of the Strategy is to identify foreign barriers to EU imports and to pressure foreign governments to remove them. The Market Access Strategy was officially announced at a business symposium which Trade Commissioner Sir Leon Brittan declared a "D-Day for European Trade Policy," stating, "We are going onto the offensive, using our trade powers forcefully but legitimately to open new markets around the world" (Directorate General I Press Conference). This is a considerable change from the EU's more protectionist, inward-looking, reactive trade policy of the past (Paemen & Bensch 1995).

To implement the Market Access Strategy, the European Commission has attempted to forge direct working links with private enterprises in the EU. This permits enterprises to bypass member state representatives and forge ongoing relationships with units within DG1, the *directorate generale* of the Commission responsible for external trade matters. Both businesses, in particular well-connected businesses, and the Commission stand to benefit. Organized commercial interests benefit through potential market expansion and enhanced access and influence over the EU institution responsible for consulting foreign governments on trade matters. The Commission benefits through enhancement of its stature both within the EU among powerful commercial interests and abroad through its more dynamic leadership role. Although the member states retain a right to authorize or

veto Commission actions,¹ in most matters, private enterprises and Commission representatives become the dominant players.

To accomplish the Strategy's objectives, Commissioner Brittan established within DG1 a "Market Access Unit." The Unit has created a database listing foreign trade barriers compiled by sector and country, which has grown from 350 identified trade barriers in early 1996 to 800 in early 1997 to more than 2,200 today.² The Unit estimates that over 90 percent of the identified trade barriers were reported by businesses or their trade associations.³ The number of individual "hits" on this site has risen, on average, from 30,000 per day in early 1996 to 60,000 in early 1997 to more than 150,000 per day today (Brittan; Prince). Over 55 percent of these daily queries come from companies employing fewer than 400 people (Prince). Although, the Unit does not track which of the 2,200 trade barriers were referred to it electronically, it estimates the number to be in the range of 40 percent (Prince).

Once the European Commission is notified of an alleged trade barrier, it conducts an internal investigation of the allegation. In this investigation, the Commission determines whether the trade barrier exists, the extent of its economic impact on the EU, and whether the barrier constitutes a

¹The EU Council, comprised of representatives of the fifteen EU 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.

² 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. *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 US 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 US Department of Commerce's new "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.

³ 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.

violation of a trade agreement.⁴ An EU intra-agency group, the Market Access Group, consisting of representatives of different *directorates generales*, directorates, units and desks within the Commission, meets weekly to prioritize trade barriers and assign responsibility for their investigation.⁵

B. Alternative Routes to Implement the Market Access Strategy: Business-Commission Coordination. There are two primary routes businesses use to have the EU initiate consultations with a foreign government over a trade barrier. By far the most commonly used procedure is the traditional “intergovernmental” Article 113 process, which was used in all but six of the EU’s first [forty-three] claims brought before the WTO.⁶ As part of its Market Access Strategy, the European Commission actively promotes an alternative procedure under the EU’s Trade Barrier Regulation (TBR), which grants private enterprises rights to have investigations initiated. The TBR procedure has led to the Commission’s investigation of twelve matters, five of which resulted in the filing of WTO complaints. In operation, both procedures comprise a de facto delegation of authority to the Commission. The Commission in turn works closely with private enterprises to implement the Market Access Strategy. Under both procedures, the foreign trade barrier in question can ultimately be referred to a WTO dispute settlement panel.

1. The Article 113 process. Under Article 113 of the Treaty of Rome, all decisions concerning the EU’s foreign commercial policy are to be made by the EU Council, which consists

⁴Before 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 EU.

⁵The Commission investigation will typically be conducted by the Market Access Unit in an Article 113 proceeding, although other Units of DG1 could take primary responsibility. In a TBR case (described below), the Commission’s TBR unit conducts the investigation.

⁶ These are figures published on the WTO Web site as of May 7, 1999. As of March 16, 1998, twenty-six of twenty-seven claims were brought via article 113. From March 16, 1998 to May 7, 1999, however, five of the EU’s sixteen new claims resulted from TBR procedures.

of a representative of each of the fifteen member states.⁷ The European Commission, which represents the EU on trade matters vis-à-vis third countries,⁸ is to implement these decisions in consultation with a committee of member state representatives. This committee consists of fifteen members, one representing each member state.⁹ It is called the Article 113 Committee because it exists pursuant to Article 113 of the Treaty of Rome, which provides as follows:

“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” (emphasis added).

The EU Council has, in practice, delegated considerable authority to the Article 113 Committee. Although the Article 113 “special committee” was created to “consult” with the European Commission in an advisory capacity, it has evolved into the Council’s informal decision-making body on most matters. Formally, the Council is to make all decisions on external commercial relations under the Treaty. However, it typically meets only once per month to discuss selected matters of political importance, such as the EU’s negotiating position in multilateral and bilateral trade agreements. Moreover, often the Council merely ratifies decisions already taken by the Article 113 Committee.

⁷In foreign trade matters, the Council typically acts through the Foreign Affairs Council, which consists of the foreign affairs ministers of the fifteen member states.

⁸The EU 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) holds 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, in broad terms, the member states retain competence to the extent the provision of the service requires a person to cross an EU border, which is usually the case.

⁹The fifteen members of the Article 113 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 once a month unless special meetings are called on important matters. Otherwise, lower-level officials from the member state trade ministries meet in Brussels on a weekly basis.

The Article 113 Committee's de facto authority is exercised on an informal basis. Votes are not taken in Article 113 meetings, and are usually not necessary. Rather, decisions are typically made by consensus, with no member state formally objecting. Only if a member state objects will the European Commission refer the matter to the EU Council for a decision by a Qualified Majority Vote.¹⁰ This can result in considerable delay. If no member state formally objects, the Chair of the Article 113 meeting, who is a representative of the member state that holds the presidency of the Council at the time, simply notes whether sufficient votes are present in support of the measure and, on this basis, concludes the meeting by confirming whether a favorable decision has been taken (Johnson Interview).¹¹ The Commission is thereby authorized to proceed with the measure in question.

Because of the number and complexity of trade issues, and the European Commission's technical knowledge and access to information through its investigations, the Article 113 Committee has, in turn, delegated increasing authority over trade disputes to the Commission.¹² Though all decisions are officially to be taken by member state representatives, the Commission often plays a predominant role. Not only does the Commission have greater knowledge of the dispute, it alone proposes any action to be taken. Decisions taken by the Article 113 Committee are based on position papers and written proposals presented by the Commission. These formal proposals are often preceded by behind-the-scenes discussions between the Commission and different member states in an attempt to forge consensus or, failing that, a position supported by a "qualified majority" of the member state representatives.

¹⁰Decisions on Article 113 matters are, technically, to be made by the Council by "Qualified Majority Vote" (QMV). Under the EU 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 148 of the Treaty of Rome, as amended, sets forth the number of votes each member state holds on the EU 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.

¹¹ Mr. Johnson was a former Article 113 representative from the United Kingdom, and is now an international trade consultant with Malmgren Golt Kingston & Co. Ltd. in London.

¹² 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 113 Committee.

The de facto delegation of authority to the European Commission has increased following the Commission's new Market Access Strategy. Most trade issues are no longer mentioned at the Article 113 Committee's weekly meeting. Rather, the Commission and member states have developed a flexible operating procedure through use of electronic communication (Prince). On a weekly basis, the Commission provides to the Article 113 Committee a list of twenty-five to thirty trade barriers. It sends 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.¹³ Unless a member state representative opposes a proposal or requests that the matter be discussed in the weekly Article 113 meeting, the Article 113 Committee is deemed to have adopted the Commission's proposal. In the vast majority of cases, this is how the Commission obtains authorization to consult with foreign governments over trade barriers. In practice, member state representatives typically refer only three or four (roughly 10 percent) of the Commission's listed matters to be discussed at the weekly meeting. Likewise, if a settlement is negotiated with a foreign government that does not entail a modification of an EU 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.

Despite the reputation of the Article 113 process as an "intergovernmental" procedure, and despite the fact that Article 113 meetings take place behind closed doors without private parties being present, businesses also play an active role within the process. Throughout the procedure, the Commission retains contact with the EU's concerned commercial interests. Guided by a Commission representative, sophisticated businesses attempt to ensure that there is sufficient support within the Article 113 Committee prior to the submission of the electronic message containing the Commission's proposal. They coordinate their position with businesses in other member states to ensure that each respectively contacts its member state representative to encourage support of their

¹³As 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.

mutual interests. If a matter is raised at an Article 113 Committee meeting, the meeting may merely formally ratify a decision that has already been made.

The implementation of Article 113 of the Treaty of Rome has involved a progressive delegation of decision-making authority over most trade matters, first from the EU Council to the Article 113 “special committee,” and then from the Article 113 Committee to the European Commission. In the context of the WTO’s trade-liberalizing rules and the Commission’s Market Access Strategy, businesses can successfully work behind the scenes to challenge foreign barriers to their exports through their contacts with Commission and member state officials. Businesses should increasingly use this EU “intergovernmental” mechanism as they learn to profit from the WTO rules.

2. The Trade Barrier Regulation. The EU’s Trade Barrier Regulation (TBR) is, in theory, a more direct mechanism pursuant to which a business may have its interests represented by the EU in international trade disputes. The TBR grants private enterprises legal rights to petition the European Commission to investigate trade matters and bring trade claims on their behalf. The TBR is the successor to an earlier device known as the New Commercial Policy Instrument (NCPI), which the EU Council enacted in 1984 in response to unilateral measures taken by the United States against politically sensitive EU economic sectors such as steel and agriculture. The U.S. measures were taken pursuant to Section 301 of the Trade Act of 1974. The NCPI was promoted, in particular by the French Government, in order to create a counterpart under EC law to Section 301.¹⁴ Businesses,

¹⁴ The primary differences between Section 301 and the former NCPI and new TBR are the potential unilateral nature of Section 301 and its wider scope of coverage. First, Section 301 authorizes the United States Trade Representative (USTR) to implement unilateral measures in retaliation for foreign trade barriers, while TBR does not. TBR rather requires the Commission to initiate applicable international procedures. Historically, the filing of a Section 301 complaint thus posed a greater threat to a foreign government than a complaint filed in the EU. Given the changes in the WTO rules, however, this difference is less significant where the foreign government is a WTO member, because U.S. unilateral action may be constrained and the EU’s threat of a WTO action enhanced.

Second, while US Section 301 has a broad scope of coverage, the European Court of Justice held in its Opinion 1/94 that the individual Member States (and thus not the EC institutions) retain exclusive competence over most intellectual property and services issues covered by the WTO TRIPS and GATS agreements. (*See supra* note..). In consequence, the TBR should not cover most intellectual property and services issues. However, in practice, two of the eight TBR complaints involve intellectual property claims and no Member State has challenged the Commission’s competence on these matters. The two cases are (i) a claim by French cognac producers against Brazil concerning lack of protection of their “appellation d’origine” (geographic indication rights), and (ii) a claim by

however, filed only seven complaints under the NCPI during its ten-year history. Moreover, the Commission rejected two of the petitions on the grounds that the complainant failed to present sufficient evidence of an “illicit commercial practice.”¹⁵ Because the instrument was deemed ineffective, the Council replaced it on January 1, 1995, with the TBR, formally named Regulation 3286/94.

Although the TBR grants businesses legal rights, the process still operates as a form of European Commission-business partnership. Industry is likely to choose which mechanism to use—the TBR or the Article 113 route—in consultation with the Commission. Sometimes the Commission will in fact make the decision. For instance, the Commission touts as a TBR success the TBR claim brought by the Italian silk federation, FEDERTESSILE, which led to an EU filing of a WTO claim against the United States concerning the application of its rules of origin to Italian silk products.¹⁶ The day before formal WTO consultations were to commence, the United States agreed to modify its application of its rules of origin, to the Italian silk industry’s satisfaction.¹⁷ However, FEDERTESSILE had never heard of the TBR until informed of it by the Commission (Mr. Tettamanti Interview).¹⁸ Moreover, FEDERTESSILE, which was represented by no outside or in-house counsel, was entirely dependent on the Commission to prepare its complaint and lead it through the procedure. It relied on the Commission as its ally to whom it supplied all relevant factual

an Irish copyright association, the Irish Music Rights Organization, against a section of the US Copyright Act which exempts shops, bars, restaurants and similar public places from having to pay royalties to performing rights organizations. This demonstrates once more how EC trade law “in action” can be quite different than the law in the books.

¹⁵The 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).

¹⁶ 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.

¹⁷ However, the industry subsequently challenged the United State’s implementation of the settlement, leading to the filing of a new EC complaint against the US before the WTO on November 19, 1998.

¹⁸ Mr. Tettamanti is a representative of FEDERTESSILE.

information for purposes of the Commission's investigation, the WTO filing, consultations and ultimate settlement with the United States. While, over time, enterprises will become more aware of their TBR rights, they will always be constrained in how they use these rights since they ultimately depend on Commission officials to represent their interests before foreign governments and international tribunals.

The unit of the Commission responsible for implementing the TBR stresses three reasons for choosing the TBR mechanism over the Article 113 process. First, the TBR procedure is more transparent, so that businesses without political contacts can more closely follow the procedure.¹⁹ The TBR grants an enterprise the legal right to cause the European Commission to formally investigate an issue on its behalf, to provide it with all non-confidential information available, to conduct a hearing at which arguments may be presented, and to publish the relevant decision in the EU's *Official Journal*, which decision is subject to review by the European Court of Justice. The TBR prescribes a timetable for the investigation, so that the enterprise will be certain a decision is taken within a given time period (generally five to seven months). Trade associations also state that the TBR unit of the Commission is more responsive to an enterprise's trade concerns than members of the Article 113 Committee and other divisions within the Commission, which are more likely to balance an enterprise's concerns against other EU political interests (Tettamanti Interview).

Second, the different voting rules under the TBR provide business and the European Commission with greater leverage. Under Article 113, decisions to authorize the Commission to enter into consultations or bring a WTO claim are made by a qualified majority vote of the EU Council. Under the TBR, these decisions are made by the Commission and can only be overturned by a Qualified Majority Vote of the Council. Even if the member states and the Commission still attempt to work by consensus, the rules can influence their behavior, in particular given the publicity

¹⁹The legalistic nature and greater "transparency" of the TBR process, as compared to the Article 113 process, explains why more has been written on it than on the Article 113 procedure, even though the 113 procedure is used over 95 percent of the time. While practicing EU lawyers have written a number of articles on the NCPI and the TBR, they have written nothing on the Article 113 process. Even so, EU lawyers remain much less involved in the TBR process than U.S. lawyers in Section 301 proceedings.

resulting from the relative transparency of the TBR process.²⁰

Third, given the greater efficacy of the WTO dispute settlement mechanism, the European Commission believes that the TBR can be used as a tool to progressively 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 mere bringing of a TBR complaint will pressure foreign governments to negotiate. Some commentators respond, however, that TBR exists merely to give the EU the appearance of having a tool comparable to Section 301 (Johnson Interview).

The European Commission has actively promoted use of the TBR by business. 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 twelve investigations, almost twice the number brought under the NCPI over ten years.²¹ The increase results primarily from changes in the underlying WTO dispute settlement rules, and not from the TBR itself, although the TBR does ease the procedural requirements for bringing a claim.²² On account of WTO rule changes, the Commission, acting on behalf of a private complainant, now has greater leverage to press for a

²⁰The Commission claims that the different voting rules can, in particular, benefit smaller enterprises whose trade problems may be economically insignificant for the EU, so that they would not be pursued through the "intergovernmental" Article 113 process. 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 EU. IMRO, however, was supported by copyright interests throughout the EU.

²¹ [Eleven] of the twelve TBR claims to date involve practices in countries in North and South America: three against the United States, four against Brazil and one each against Argentina and Chile. This imbalance could result from the greater transparency of trade barriers in the Americas compared to those in Asia. [The only TBR] complaint brought against a country outside the Americas is against Japan and, interestingly, one of the grounds is a non-violation nullification and impairment claim involving Japanese restrictive business practices.

²²The 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 an industry" in order to lodge a complaint. Under the TBR, an enterprise may now lodge a complaint on its own behalf. The injury requirement has 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."

successful outcome.²³ In the past year, the Commission filed five WTO complaints resulting from TBR investigations, which are: (i) a complaint by the EU 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 US copyright law, (iii) a complaint by the Italian silk producers against US rules of origin rules, and (iv) two complaints by the EU leather trade association (COTANCE), one against Argentinian export restrictions and one against Japanese market access barriers.²⁴

The European Commission actively solicits private companies to use the TBR process. 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." Stewart acknowledges that successful use of TBR will require "a certain change in attitude in EC companies" (Stewart 1996, 125).

The European Commission gives multiple explanations for the reticence of EU businesses to use the TBR. First, EU industry has traditionally focused on defensive measures to protect its market from imports, and not on offensive measures to challenge foreign protectionist practices. Second, EU industry has traditionally been nationally based and thus has looked to assistance from national representatives as opposed to EU authorities in Brussels. Third, the idea of an individual enterprise forcing the government's hand on international economic matters through a legal procedure is an American notion, alien to EU traditions of diplomatic discretion and secrecy. Countries in continental Europe have traditionally operated on more centralized or corporatist models. Individual enterprises have been less likely to directly lobby or publicly challenge government agencies in these countries.

These differences are diminishing, which the Commission hopes will result in greater use

²³ For example, the Italian silk producers' TBR claim was initially settled with the United States in favor of the Italian industry the day before WTO consultations were to commence. However, a dispute over the settlement's implementation resulted in the EC filing a new WTO complaint against the US.

²⁴ 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.

of the TBR. As more regulation is enacted by EU institutions, Brussels has become a center for lobbying activity, especially by Europe-wide trade associations. While lobbying is not as intensive and widespread in Brussels as in Washington, sector-specific trade associations are increasingly engaged in direct lobbying. However, in practice, there may only be limited changes in the use of the TBR, not because of traditional EU systems of governance, but rather because of the relatively effective use of the Article 113 procedure. To the extent the Article 113 process remains flexible and effective, the TBR may continue to play a more symbolic role, constituting a formalization of what already effectively takes place within the Article 113 process.

C. Use of the Mechanisms to Date: The Nature of the Business. Enterprises in the EU face a maze of national and EU supranational councils, committees, *directorates generales*, directorates, units and sectoral and country desks when they ask public officials to act on their behalf. Enterprises ultimately rely on someone within the European Commission, possibly in conjunction with a national authority, to guide them through the maze. 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 also has a substantial antidumping practice.²⁵

Whether an enterprise works successfully with EU and national public officials can depend on its size and nature. Large multinational businesses and those that are members of national or EU trade associations with offices in Brussels have developed, or have access to a representative with, a more sophisticated understanding of the EU system. For example, national associations that are members of the Confederation of European Producers of Spirits (CEPS) have worked closely with

²⁵This fact is confirmed by lawyers and government officials in Washington and Brussels. One explanation for the difference is that EU enterprises have been less willing than U.S. firms to pay the significant legal fees resulting from the use of private counsel in these proceedings. European firms may be particularly hesitant to use private counsel given that, in an international dispute, the European Commission, and not their own lawyers, ultimately represents them. However, U.S. firms face this same dilemma. Another explanation is that, since European national traditions of public-private relations have been traditionally more corporatist or centralized than in the U.S. pluralist tradition, trade associations are more accustomed to directly working with public officials without the assistance of attorneys. As lobbying continues to develop in Brussels, and as the EU actively pursues trade claims pursuant to its Market Access Strategy, this difference could diminish. There are already some notable examples of EU 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. He recently represented Korea before the WTO case brought by the EU and US against Korea's tax practices involving the alcoholic beverage *soju*.

the European Commission on three of the twenty-seven complaints brought by the EU before the WTO: 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*. In the EU's case against Japan, known as "Japan Alcohol," after a WTO appellate panel found Japanese sales taxes to be discriminatory in violation of WTO rules, Japan agreed to change its regulations (WTO Appellate Body Report). This initial success in 1996 led to the EU's filing in 1997 of complaints against South Korea and Chile.²⁶ The Korean case was successfully litigated in 1999 to CEPS's benefit, as should the Chilean case. Now a sophisticated repeat player, CEPS likewise works with the Commission on China's terms of accession into the WTO in so far as they affect the beverage producers' group.

Similarly, larger trade associations have been the primary users of the TBR. COTANCE, which represents EU producers of leather products, and EUROFER, which represents EU steel producers, have initiated four of the eight matters to date under the TBR.²⁷ Two other TBR complaints were brought by members of the EU textile association, EUROTEX: one by FEDERTESSILE, the 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,²⁸ the

²⁶The EU 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 EU 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.

²⁷As 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.

²⁸ 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.)

French branch of CEPS. If not settled, the case could lead to the EU's filing of a fourth WTO claim on behalf of members of CEPS.

Smaller businesses without the benefit of an active trade association face greater difficulties. One of the goals of the EU's Market Access Strategy is to provide these businesses with direct access to the European Commission via the Internet. In addition, smaller businesses can first contact their national representatives at a national ministry of commerce, who can introduce them to a Commission representative. It appears, however, that the primary beneficiaries of the Market Access Strategy will be larger enterprises and better-organized groups with direct, ongoing relations with the Commission.

While the TBR will likely be used increasingly for a subset of cases, most exporting businesses continue to prefer to work behind the scenes with the European Commission and member states under the Article 113 process. The Article 113 process permits businesses to remain more anonymous, since they may work through Commission representatives to negotiate the removal of foreign barriers. Moreover, the rights granted to enterprises under the TBR have been in large part offset by the increasingly flexible use of the Article 113 procedure under the Market Access Strategy, which, for certain industries, such as the European spirits industry, has been quite effective.

D. Conclusion: Implications for Policy Debates over the Effectiveness of WTO Rules.

Through its Market Access Strategy, the EU has developed a more outward-looking, proactive trade policy, pursuant to which the European Commission works more closely with private commercial interests. Both the Commission and business, in particular well-organized businesses, stand to benefit from this form of joint venture, or partnership. The Market Access Strategy provides exporting businesses with new opportunities for market expansion. The Strategy simultaneously enhances the Commission's stature in the field of external commercial relations both within the EU and abroad.

The decision-making process in the EU for the bringing of foreign trade claims is thus not a purely "intergovernmental" negotiation among the respective member states and the European Commission over potentially divergent national and EU interests. Rather, it is a dynamic, ad hoc, hybrid, multitiered process in which private interests are deeply implicated. It is multitiered 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 EU public officials, on an ad hoc basis. It is a hybrid because the process is neither purely intergovernmental nor purely private.

Proponents of a neoliberal trading order maintain that the WTO system should be viewed less as an international treaty than as a new world trade “constitution.” Under this trade “constitution,” these proponents assert that private parties should be granted trading rights so that enterprises may act as “private attorneys general” in order to assure the effectiveness of the WTO rules, just as is the case under the “dormant” commerce clause of the U.S. Constitution and Article 30 of the Treaty of Rome. These commentators contend that WTO rules should have direct legal effect within the national jurisdictions of the WTO’s contracting parties so that businesses may enforce them (Petersmann 1991, 463; Brand 1992, 95–102; and Journal of World Trade Law Symposium 1998)²⁹

Like the United States, the EU has refused to make WTO rules “self-executing.”³⁰ Private parties do not have the right to invoke WTO rules under internal U.S. or EU law. Rather, only governments have the right to invoke WTO rules before the WTO’s Dispute Settlement Body. Thus, at first glance, the world trading order appears to remain a state-dominated system. However, now that the WTO includes an effective, enforceable dispute settlement system, public authorities negotiate trade claims with considerably greater leverage. They negotiate claims on behalf of private enterprises within the “shadow” of the dispute settlement system and its burgeoning case law. While WTO rules may not have “direct effect” in the United States or EU, the ad hoc partnerships formed

²⁹ Professor Petersmann, for example, asserts that lawyers should “recognize freedom of trade as a basic individual right.”(at 463).

³⁰ The term *self-executing* is used in U.S. law and the term *direct effect* in EU 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 subissues, 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 30 of the Treaty of Rome (which requires that all “quantitative restrictions on imports and all measures having equivalent effect . . . be prohibited between Member States”) has “direct effect” in all EU member states and can be invoked by private parties before national courts.

between public authorities and private enterprises permit the WTO rules to be given a form of “indirect” direct effect.

As EU businesses become more aware of the WTO rules and “successful” WTO case outcomes,³¹ they should increasingly use the Article 113 and TBR mechanisms to drive the trade liberalization process forward.³² This permits the WTO system to work increasingly in keeping with a neoliberal model according to which private enterprises play an active, though indirect, role in the litigation and negotiation over trade-regulatory barriers. In practice, the WTO system is much more than a purely “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, the screen has become more porous.

³¹By 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.

³² This process, however, calls into question other societal concerns. Unions, environmental organizations and other nonbusiness interests have quite different agendas in regard to the “effectiveness” of WTO rules. To defend their endeavors at the national and international level, environmental groups demand that the WTO decision-making process be made more transparent and that they be granted greater access to the WTO’s many fora. Only then can they advocate, albeit in a defensive posture, their positions with respect to domestic regulations that implicate both trade and non-trade societal interests. See papers by Trubek and Knauss and Charnovitz and Bignami in chapters ___ and ___.

III. US-EC Cooperation in Challenging Foreign Trade Barriers: Developments and Limits to a Transatlantic Public-Private Partnership

This section will be written following the conference.

1. Developments in cooperation- firms can take the lead (example of Korea alcohol case, US & EU industry pressuring their governmental representatives to collaborate and not be combative as in former Japan-Alcohol case)

- one government may take the lead as US-EU feel more comfortable- EC in Chile alcohol
- sharing of legal arguments- US in Kodak, uses EC national treatment arguments
- impact of transatlantic investment (e.g. chemical industry)
- information from foreign subsidiaries;
- work of tabd on intellectual property matters (iipa)

2. Limits- different interests in bringing a single case- Japan-alcohol

3. US-EC differences

a. ip- industry less aggressive in EC

b. government less supportive in EC: "our government is wonderful in supporting our industry; European Commission is always less supportive" (iipa)

- bureaucrats can be more condescending toward industry in EC, whereas USTR thinks their responsibility is to serve business (more of a client relation)-discus
- easier to get information on cases from US, although other countries worse than EC (discus)

c. government has greater comfort with business in US

- revolving doors in US vs people stay in government longer in EC (so longer perspective)

4. Domestic industry may welcome challenges of domestic regulations (indirect direct effect)- ip imro case- iipa wants good precedent re no exceptions, so hopes US loses the case

- same with US challenge of Ireland over copyright- pushed forward process in Ireland by 2 yrs (iipa); Irish industry welcomed
- also use to reduce power of state regulation- Korea alcohol & attempt to lower taxes on US products as opposed to raise taxes on soju producers

5. Ongoing conflicts and controversy of 301

- the new EC challenge to Section 301 (relation of Section 306 in Bananas case); other retaliatory WTO suits (as those over taxes)

BIBLIOGRAPHY

- To be completed:

Ronald Brand, *GATT and United States Trade Law: The Incomplete Implementation of Comparative Advantage Theory*, Journal of Legal Economics 2 (1992): 95–102.

Anne-Marie Burley & Walter Mattli, "Europe Before the Court: A Political Theory of Legal Integration," International Organizations 47 (1993): 1.

Directorate General I Press conference of Nov. 12, 1996,

<<http://europa.eu.int/en/comm/dg01>>.

Justin Greenwood, et al., eds., Organized Interests and the European Community (1992).

Japan—Taxes on Alcoholic Beverages, Report of the Appellate Body, 4 Oct. 1996,

<<http://www.wto.org>>.

Michael Johnson, personal interview, March 5, 1998.

Robert Keohane & Stanley Hoffman, The New European Community: Decisionmaking and Institutional Change (1991).

I. Macleod, I.D. Hendry & Stephen Hyett, The External Relations of the European Communities (1996).

Mark Maresceau, ed., The European Community's Commercial Policy after 1992: The Legal Dimension (1993).

Hugo Paemen & Alexandra Bensch, From the GATT to the WTO: the European Community in the Uruguay Round (1995).

R.H. Pedler & M.P.C.M. Van Schendelen, eds., Lobbying the European Union (1994).

Ernst-Ulrich Petersmann, Constitutional Functions and Constitutional Problems of International Economic Law 463 (1991).

Mark Pollack, "Delegation, Agency and Agenda Setting in the European Community," International Organizations 51 (1997): 99.

Petros Sourmelis, personal interview.

Alistair Stewart, "Market Access: A European Community Instrument to Break Down Barriers to Trade," Int'l Trade L. and Reg. 121, 123 (1996).

Mr. Tettamanti, personal interview, Feb. 19, 1998.

Journal of World Trade Law 32 Symposium on "Is the WTO Dispute Settlement Mechanism Responsive to the Needs of the Traders? Would a System of Direct Action by Private Parties Yield Better Results?" (1998) .