Abstract: The Public and the Private in International Trade Litigation
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The growing role of law in international economic relations is abetted by the blurring of the public and the private. International trade law, while formally a domain of public international law, profits and prejudices private parties. Private parties, in particular well-connected, wealthier and better-organized ones, attempt to use the World Trade Organization’s legal system to advance their commercial ambitions. A more effective WTO public law spurs US and European private legal strategies, which reciprocally yield further WTO public law.

The manuscript demonstrates how public authorities and private firms have complementary, though not identical, goals in challenging trade barriers. They form ad hoc public-private partnerships to advance their aims. This growing interaction between private enterprises and public officials in the bringing of trade claims reflects a trend from predominantly intergovernmental decision-making toward multilevel private litigation strategies.

The manuscript evaluates the use of various mechanisms in the United States and the European Union through which private firms and governmental authorities collaborate to challenge foreign trade barriers. The manuscript assesses the historical, political, economic and cultural reasons for a more proactive role of US business in international trade disputes, as well as some trends in the EU toward US-style practice. The manuscript examines the implications of these public-private trade litigation networks for the stability of US-EU relations and the effectiveness and equity of the WTO judicial system.

In contrast to much of international law scholarship, this manuscript takes a socio-legal, actor-centric approach. In a legal realist tradition, it evaluates the legalization of the international trading system in terms of its effects on private behavior, as opposed to its formal rules and judicial decisions. The manuscript builds on over one hundred interviews with former and current officials at the Office of the United States Trade Representative, other US agencies, the European Commission, EU member states, representatives of US and EU business trade associations and private lawyers based in Washington and Brussels.
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THE PUBLIC AND THE PRIVATE IN INTERNATIONAL TRADE LITIGATION

By Gregory Shaffer

From different vantages, the enterprises of international law and international lawyers have been critiqued for being irrelevant and illusory. Political scientists working in the realist tradition maintained that international law is irrelevant because powerful states simply ignore it when advancing national goals.\(^2\) Positivist legal theorists maintained that international law is not law because it involves no command issued from a central authority backed by a sanction.\(^3\) Again, see, e.g., HANS JOACHIM MORGENTHAU, POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE 278 (1963) (calling international law “a primitive type of law primarily because it is almost completely decentralized law”); and GEORGE KENNAN, AMERICAN DIPLOMACY (1951) (critiquing legalistic approaches to international relations as based on false assumptions). These same political realists critiqued international law as dangerous for the United States were it to be taken seriously. In their view, a focus on international law as opposed to international politics cloaks strategic concerns essential for the security and advancement of the state in legalistic and moralistic garb that rivals may use to seek advantage and ignore when impeding their interests, see id. at 95. (maintaining that the “most serious fault” in past U.S. foreign policy was its “legalistic-moralistic approach to international relations”). Yet in pointing to the danger of international law, legal realists also implicitly accepted that international law might not be irrelevant or illusory.

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\(^2\) See, e.g., JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832), in THE GREAT LEGAL PHILOSOPHERS 352 (Clarence Morris ed., 1971) (maintaining that international law is not law, but simply a form of “positive morality” because there are no commands issued by a sovereign “armed with a sanction.”). Similarly, Max Weber writes, “As is well known it has often been denied that international law could be called law, precisely because there is no legal authority above the state capable of enforcing it. In terms of the present terminology this would be correct, for a system of order the sanctions of which consisted wholly in expectations of disapproval and of
powerful states could simply ignore it at will. Yet, regardless of the stringency of one’s definition of law, international law ascended in prominence with the Cold War’s demise, especially in the economic sphere where states increasingly directed diplomatic endeavors. International economic norms and rules correspondingly have more deeply penetrated into domestic systems.

Nowhere is international law’s rising prominence more clear than in the realm of international economic law following the creation of the World Trade Organization (WTO) in 1995. Even in a strict Austinian sense, WTO law consists of rules that a centralized supranational institution (the WTO dispute settlement body) enforces through issuing judgments that, if not complied with, trigger sanctions. All states, even the most powerful states, have either complied with WTO judgments by modifying domestic regulations and practices, or, in the few cases where domestic politics blocked such modification, accepted the resulting sanctions. Although the impact
of WTO law does not necessarily contradict realist notions, since arguably the world’s most powerful states have benefitted from WTO law’s enforcement, international trading relations have been governed increasingly through law—or perhaps better stated, through power mediated by law.8

This growing role of law in international economic relations is abetted by the blurring of the public and the private. WTO law, while formally a domain of public international law, profits and prejudices private parties. As international economic relations become legalized, lawyers listen and market their wares. Private parties, in particular well-connected, wealthier and better-organized ones, attempt to use the WTO legal system to advance their commercial ambitions.9 A more effective WTO public law incites U.S. and European private legal strategies, which in turn yield further WTO public law.10 WTO law thereby becomes “harder” law11 through which private actors exercise

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8 As discussed below, the U.S. and EC have been the dominant users of the WTO system. From the WTO’s inception through [July 2001], the United States initiated [57] claims before the WTO dispute settlement body and the EC brought 53. See also Marc Busch & Eric Reinhardt, Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement, in THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW 457, 462 (Robert Hudec ed., forthcoming 2002) (noting that from 1948 through the end of June 2000, the United States was either a complainant or defendant in 340 GATT/WTO disputes, constituting 52% of the total number of 654 disputes, while the European Union was a party in 238 disputes, or 36% of that total).

9 The reaction of private parties throughout the world in opposition or support of the WTO system and its stream of legal verdicts, indicates the relevance of WTO law to states and their constituents. See, e.g., Christopher G. Caine, Powers of Persuasion: Behind the Scenes with the World’s Top Lobbyists, 10 CORP. LEGAL TIMES 20 (2000) (interviews by Business Without Borders of lobbyists for multinational corporations on their lobbying strategies and goals for the WTO); Trish Saywell & Yan Zhihua, Ready for The Deluge, FAR E. ECON. REV., March 23, 2000, at 44 (reporting Chinese companies’ preparation and hopes for the WTO); Larry Elliott, No Sleep Lost Over Seattle, GUARDIAN, Mar. 4, 2000, at 32 (citing WTO Director General Michael Moore’s statement that at Seattle, “each delegate had a huge and aggressive section of civil society with them”). Because private constituents perceive WTO law as potentially effective, they increasingly press, formally and informally, to play a greater role in WTO litigation. See, e.g., Bruce Stokes, New Players in the Trade Game, NAT’L J., Dec. 18, 1999, at 3630 (reporting NGOs efforts to gain direct access to the WTO); Charlotte Denny, It’s All a Matter of Balance, GUARDIAN, Nov. 19, 1998, at 19 (“US government took Europe's banana trade to the WTO within 24 hours of Chiquita Brands making a $500,000 donation to the Democratic Party.”); see also Greg Hitt, Fund Raising for Seattle WTO Meeting Raises Concerns, WALL ST. J., May 17, 1999, at A28 (noting invitations extended to large corporations, in consideration of a fee, to attend receptions with trade delegates at the WTO Ministerial Meeting in Seattle).

10 The interaction between private litigation strategies and public international law has played an important role in European integration. See e.g. Karen Alter, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW 52-53 (2001) (“shows how the interaction between private litigants raising cases, national courts referring cases and invoking ECJ jurisprudence, and the ECJ interpreting European law all contributed to the construction of an international rule of
influence in its shadow.

This Book evaluates the use of formal and informal mechanisms in the United States and the European Union (EU) through which private firms and governmental authorities collaborate to
challenge foreign trade barriers\(^{13}\) within the context of the WTO system. The Book shows how public authorities and private firms have reciprocal, though not identical, goals in challenging these barriers. They form public-private partnerships to advance their complementary aims.

The growing interaction between private enterprises, their legal representatives and U.S. and EC public representatives in the bringing of most trade claims reflects a trend from predominantly intergovernmental decision-making\(^{14}\) toward multilevel private litigation strategies involving direct public-private exchange at the national and supranational levels. Given the trade-liberalizing rules of the World Trade Organization, this trend has an outward-looking, export-promoting orientation, comprised of more systematic challenges, often by larger and well-organized commercial interests, to foreign regulatory barriers to trade.\(^{15}\) International trade disputes are, in consequence, not purely

\(^{13}\)Foreign trade barriers include any measure that directly or indirectly results in an impediment to trade. Tariffs and quotas are classic trade barriers. Less transparent trade barriers include internal taxes, which are neutral on their face but are applied principally to foreign imports, internal subsidies, technical standards, licensing requirements, inspections and similar measures that result in increased costs for foreign producers. Firms relying on intellectual property protection maintain that the failure to recognize and enforce intellectual property rights is also a barrier to trade. Although intellectual property protection standards are now incorporated in the international trading system under the TRIPs Agreement, this remains more controversial. See, e.g., Jagdish Bhagwati, Comment by Jagdish Bhagwati, in THE NEW GATT: IMPLICATIONS FOR THE UNITED STATES 111, 111-14 (Susan M. Collins & Barry P. Bosworth eds., 1994).

\(^{14}\)In international relations literature, the term “intergovernmental” refers to a concept of international relations in which the primary actors (if not the sole actors) are governments, as opposed to commercial or other civil actors. For a review of “intergovernmental” theory, as opposed to “transgovernmental” and “transnational” theories of international relations, see Mark Pollack & Gregory Shaffer, Transatlantic Relations in Historical and Theoretical Perspective, in MARK POLLACK & GREGORY SHAFFER, TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY, at 1, 20-33 (2001).

\(^{15}\)This is today sometimes referred to as a “neoliberal” orientation. The term neoliberal, as used today, refers to a model of societal relations in which government regulation of trade is constrained in order to foster the play of market forces driven by private enterprises pursuing profit maximization. In a pure neoliberal model, these private enterprises have direct economic rights to bring claims against trade-regulatory barriers. While most countries do not grant private enterprises the right to bring claims under WTO rules within their jurisdictions, this paper shows how private enterprises can work with government representatives to pursue their interests through intergovernmental negotiations within the “shadow” of the WTO system. The term “neoliberal,” however, also has a second aspect—that of deregulation at the national level. In theory, liberalized trade can be coupled with a strong regulatory state, so long as national regulations do not discriminate against imports of goods and services. See discussion in Gregory Shaffer, The WTO’s Blue-Green Blues: The Impact of U.S. Domestic Politics on Trade-Labor, Trade-Environment Linkages for the WTO’s Future, 24 FORDHAM INT’L L.J. 608 (2001). It is curious to see how radically ideology changed during the second half of the twentieth century by comparing today’s use of the term “neoliberal” with that used by Robert Dahl and Charles Lindblom in their 1956 book on political economy, where they refer to “neoliberalism” or new liberalism as an ideology “characterized by an almost doctrinaire fixation on certain means—particularly those legitimized during the critical years of the New Deal, such as unquestioned support for trade unions, a strong preference for action by national government as against state and local units, and support for more...
public or intergovernmental. Nor, however, do they reflect a simple cooptation by businesses, particularly large and well-organized ones, of government officials. Rather, they involve the formation of public-private partnerships to pursue varying, but complementary goals.16

Understanding the role of U.S. and European public-private partnerships in WTO litigation is important for four central reasons. First, their study provides a clearer picture of the dynamics of nominally state-state litigation within the WTO and, more particularly, the reasons for the increasing deployment of public-private networks to take advantage of a more legalized international trading system. The book assesses the use of domestic legal mechanisms to facilitate the formation and deployment of public-private networks within the United States and Europe to exploit public international law. This study is essential for understanding the operation of the WTO legal system, as the United States and EC have been plaintiffs or defendants in over 75% of WTO cases.17

Second, the study portrays the differences between European and U.S. approaches to international trade litigation, reflecting divergences in U.S. and European political and economic structures and government-business relations. In particular, the study demonstrates how the U.S. partnership approach tends to be more “bottoms-up,” with firms and trade associations playing a relatively greater role, such that U.S. cases before the WTO tend to be more short-term, litigation-focused. In contrast, the EC partnership approach tends to be more “top-down,” with a public authority (the Commission) playing a relatively greater role, such that EC cases before the WTO tend to be relatively longer term and systemic in outlook. The study demonstrates why these differences render the political management of trade disputes more difficult.

Third, this assessment of public-private partnerships offers material necessary to better

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

17 As of May 2, 2001, the United States or EC was a plaintiff or defendant in 149 of the 194 independent claims brought before the WTO, constituting 77% of the total. The United States or EC was involved in 34 of 41 (or 85%) of completed WTO cases. See Overview of State of Play WTO Disputes (updated July 13, 2001) (visited August 30, 2001) <http://www.wto.org/wto/dispute/bulletein.htm>.
evaluate proposals for changing the current WTO system, whether through curtailing WTO law,\textsuperscript{18} expanding it through granting private parties direct rights of action,\textsuperscript{19} or modifying it through tailoring remedies and providing legal resources for financially-strapped developing countries.\textsuperscript{20} Proposals for amending the WTO system are of little value if they are not grounded in a clear understanding of how the system now operates.\textsuperscript{21} Fourth, and more generally, understanding the dynamics of public-private partnerships in litigation before the WTO (the most "legalized" of all international institutions) provides empirical grounding for assessing the role, impact and potential of law in international relations.\textsuperscript{22}

Chapter I provides a theoretical framework for examining the growing role of public-private networks in international governance. It addresses the following two questions. First, why do public-private networks play an increasing role in international governance in a world of growing numbers and complexity? Second, who are the primary participants in these networks and what explains their participation? Chapter I elucidates the importance of resource interdependencies among public and private actors and \textit{per capita} stakes in outcomes. Chapter II turns to the role of public-private

\textsuperscript{18} See, e.g. \textsc{Claude Barfield, Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization} 112-29 (2001) (Barfield is the director of trade policy studies at the American Enterprise Institute, and calls for return to a more diplomatic approach); and \textsc{Steve Charnovitz, Rethinking WTO Trade Sanctions, in The Political Economy of International Trade Law} (Robert Hudec ed., forthcoming 2001).

\textsuperscript{19} Those who desire to expand WTO law most radically argue that WTO law should have "direct effect" in domestic legal systems so that private parties may directly invoke it before domestic courts. See, e.g. \textsc{Ronald Brand, GATT and United States Trade Law: The Incomplete Implementation of Comparative Advantage Theory, 2 J. Legal Econ.} 95, 95-102 (1992); \textsc{Ernst-Ulrich Petersmann, Constitutional Functions and Constitutional Problems of International Economic Law} 243, 463 (1991) (asserting that lawyers should "recognize freedom of trade as a basic individual right"). See also, \textit{Symposium, 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?} 32 \textit{Journal of World Trade Law} 147 (1998).

\textsuperscript{20} The author has received funding to complete an article that assesses the strengths and weaknesses of each of these three proposals, and advocates measures for consideration.

\textsuperscript{21} As the legal realist Karl Llewellyn maintained in the 1930s, "The argument is simply that no judgment of what Ought to be done in the future with respect to any part of law can be intelligently made without knowing objectively, as far as possible, what that part of law is now doing." Llewellyn called for "the temporary divorce of Is and Ought for purposes of study." See \textsc{Karl Llewellyn, Some Realism about Realism–Responding to Dean Pound, 44 Harv. L. Rev.} 1222, 1236-37 (1931).

\textsuperscript{22} See, e.g. \textit{Legalization and World Politics, 54 International Organization} (Judith Goldstein et al. eds., Summer 2000) (a special issue on this topic).
networks in U.S. trade policy, examining the mechanisms that private firms deploy in the United States to work with the Office of the United States Trade Representative (USTR) to challenge foreign trade barriers under WTO law and in its shadow. Under these mechanisms, the USTR, in coordination with private actors, identifies, investigates and takes action against foreign trade barriers, steadily ratcheting up pressure on foreign countries to expand private access to their markets. Chapter III turns to the relevant public-private mechanisms used in the European Union, involving, on the one hand, a formally intergovernmental procedure and, on the other, a private petition procedure. Chapter IV evaluates the historical, political, economic and cultural reasons for a more proactive role of U.S. business in international trade disputes, as well as some trends in the EC toward U.S.-style practice. Chapter V addresses the extent to which U.S. and EC private firms coordinate transatlantic efforts to more effectively challenge third country trade barriers, including domestic regulations within the United States and EC themselves. Chapter VI concludes about the reciprocal relationship between U.S. and EC public-private networks and a more legalized international trading system, constituting the WTO’s law-in-action. Chapter VI assesses the implications of these public-private networks for the stability of U.S.-EC relations and the effectiveness and equity of the WTO dispute settlement system.

In contrast to much of international law scholarship, this book takes a socio-legal, actor-centric approach. It examines the intersection of public law and private interest in WTO litigation and bargaining within its shadow. In a legal realist tradition, it evaluates the legalization of the international trading system in terms of its effects on private behavior, as opposed to its formal rules

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

24 The intergovernmental procedure is known as the article 133 process, pursuant to which the EC governments meet periodically to determine a “common” EC external commercial policy. The private petition procedure is available pursuant to the EC’s Trade Barrier Regulation, the EC’s analogue and response to the United States’ controversial Section 301 procedure.
and judicial decisions. Thus, the book focuses on the operation of public-private networks as seen in the actual handling—the “law in action”—of most commercial trade disputes. The book builds on over one hundred interviews with former and current officials at the USTR, other U.S. agencies, the European Commission, EC member states, representatives of U.S. and EC business trade associations and private lawyers based in Washington and Brussels, complemented by primary documents concerning the use of U.S. and EC procedures for challenging foreign trade barriers.

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

26 This book focuses on developments in public-private partnerships from 1995, with the creation of the WTO, through August 2002.
Chapter I. Public-Private Partnerships in Theoretical Perspective

Traditionally, social scientists have treated government as distinct from civil society, hence the public-private dichotomy. This distinction is reflected in Max Weber’s notion of the state, which he defined as “a compulsory political association with continuous organization... [having] administrative staff [that] successfully upholds a claim to the monopoly of the legitimate use of physical force in the enforcement of its order.”27 Similarly, the political theorist Robert Dahl defined government in terms of government’s “exclusive regulation of the legitimate use of force in enforcing its rules within a given territorial area.”28 Both Weber and Dahl focused on government’s exclusive hierarchical control of enforcing mandates within a defined territory.29 They thereby conceived of a clear “separation of public and private.”30 This dichotomy has been recapitulated in international relations theory, where scholars traditionally have left out private actors and focused on the interaction among states and, in some cases, the interaction among states and the international

27 Weber maintains that “A compulsory political association with continuous organization will be called a ‘state’ if an in so far as its administrative staff successfully upholds a claim to the monopoly of the legitimate use of physical force in the enforcement of its order.” MAX WEBER:, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 154 (A.M. Henderson & Talcott Parsons trans., 1947). According to Weber, “The primary formal characteristics of the modern state are as follows: It possesses an administrative and legal order subject to change by legislation, to which the organized corporate activity of the administrative staff, which is also regulated by legislation, is oriented. This system of order claims binding authority, not only over the members of the state, the citizens, most of whom have obtained membership by birth, but also to a very large extent, over all action taking place in the area of its jurisdiction.... The claim of the modern state to monopolize the use of force is as essential to it as its character of compulsory jurisdiction and of continuous organization,” id. at 156.

28 ROBERT DAHL, MODERN POLITICAL ANALYSIS 10 (3rd ed. 1976). While Dahl’s notion of polyarchy (based on control of leaders through a democratic process of broad pluralism) is the reverse image of his notion of hierarchy (where control is exercised unilaterally by the state over its citizens), both are based on a clear differentiation of the roles of government and the governed. See ROBERT DAHL & CHARLES LINDBLOM, POLITICS, ECONOMICS AND WELFARE 171, 227-36, 272-86 (2nd ed. 1976). Dahl notes how these forms of determining economic policy complement and supplement those of the price system and bargaining between governmental actors and key social groups within the nation state.

29 Governments exercise control hierarchically through enforcing rules/order through a police and judicial system. Weber emphasizes the role of hierarchy in his discussion of bureaucracies operating in a rational-legal order. See MAX WEBER:, THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 331 (A.M. Henderson & Talcott Parsons trans., 1947) (“The organization of offices follows the principle of hierarchy; that is, each lower office is under the control and supervision of a higher one.”).

30 See FROM MAX WEBER: ESSAYS IN SOCIOLOGY, 239 (H.H. Gerth & C. Wright Mills eds., 1946) (“it was left to the complete depersonalization of administrative management by bureaucracy and the rational systematization of law to realize the separation of public and private fully and in principle.”).
organizations (or regimes) they create.\textsuperscript{31} As will be seen, these notions of a public-private dichotomy, hierarchical authority, and territorial control are all called into question by concepts of governance at the national and international levels in a globalizing economy.

Institutional economists focus their studies on different mechanisms of what they term “governance,” as opposed to government. By governance, they refer to mechanisms to coordinate, control and ultimately allocate resources, thereby determining economic outcomes. The institutional economist Oliver Williamson, for example, differentiates between two primary mechanisms for allocating resources: governance by hierarchy and governance by markets.\textsuperscript{32} While Williamson’s work focuses on the operations of firms, his ideas apply to political economy generally.\textsuperscript{33} Under the concept of hierarchy, governments allocate resources by command, as through acts of legislatures, courts and bureaucracies. Governments issue regulations, impose fines and collect taxes. Markets, in contrast, allocate resources through the uncoordinated decisions of individuals, as reflected in the

\begin{quote}
\textsuperscript{31} International relations theory, until recently, predominantly began with a systemic view of states coexisting in a condition of anarchy, characterized by an absence of centralized authority. See, for example, Neorealism and Its Critics (Robert Keohane ed., 1986), and in particular, the chapters by Kenneth Waltz. International relations theorists nonetheless noted how states could create order through power (or balance of power) politics, and, under rational institutionalist theory, through regimes in furtherance of states’ shared, mutually beneficial goals. For a neorealist account, see, e.g., Joseph M. Grieco, Cooperation Among Nations: Europe, America, and Non-Tariff Barriers to Trade (1990) (Grieco focuses on state power and the importance of relative, as opposed to absolute, gains in the negotiation of trade liberalizing agreements). For a rational institutionalist account, see, e.g., Robert Keohane, After Hegemony: Cooperation and Discord in the World Political Economy (1984).
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\textsuperscript{32} On governance by markets and hierarchies, see, e.g., Oliver Williamson, Markets and Hierarchies: Analysis and Antitrust Implications (1975) (as applied to firm behavior); The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting (1985); and The Mechanisms of Governance 47 (1996) (governance mechanisms are chosen to economize on transaction costs). In the latter work, Williamson moves to a three-fold classification of market, hybrids and hierarchies, with markets and hierarchies being the “polar modes,” id. at 104. The term “hierarchies” refers to “formal administrative and bureaucratic command systems within a single organization to replace market contracting among autonomous exchange partners as the means by which [economic actors] coordinate the flow of personnel, capital, and goods through the production and distribution processes” See Leon Lindberg et al., Economic Governance and the Analysis of Structural Change in the American Economy, in Governance of the American Economy (John Campbell et al. eds., 1991).
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\textsuperscript{33} See e.g., Beth Yarbrough & Robert Yarbrough, International Institutions and the New Economics of Organization, 44 International Organization 235, 236, 249 (1990) (noting “although the origins of NEO [new economics of organization] lie in the study of the firm, the central problématiques of NEO are precisely those of political economy... In the NEO world, mutually beneficial long-term cooperation requires an institutional structure to facilitate that cooperation, a structure that involves both firms and states and both trading and governance across borders.”); and Barry Weingast, Constitutions as Governance Structures, 149 J. of Institutional and Theoretical Economics 286, 288 (March 1993) (“In important respects, the logic of political institutions parallels that of economic institutions. To borrow Williamson’s phrase, the political institutions of society create a ‘governance structure’”).
\end{quote}
price system. Markets thereby reflect a private ordering of goods, services and wealth, in contrast to a hierarchical public one.

This book addresses a third form of governance as a complement to public hierarchies and private markets, that of governance through networks. These networks bring together public and private actors to address discrete policy issues, thereby blurring the public-private distinction. In a world of growing numbers and complexity, governments increasingly have delegated traditionally “public” functions to the private sector. Governments then attempt to “steer” outcomes through

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34 For a brief overview and application of network theories of governance of transatlantic relations, from which this section takes in part, see Mark Pollack & Gregory Shaffer, Transatlantic Governance in Historical and Theoretical Perspective, supra note..., at 17; and Mark Pollack & Gregory Shaffer, Who Governs?, in TRANS ATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY, supra note..., at 301. See also John Ruggie, At Home Abroad, Abroad at Home: International Liberalisation and Domestic Stability in the New World Economy, 24 MILLENNIUM: JOURNAL OF INTERNATIONAL STUDIES 507 (1995) (differentiating among hierarchies, markets and networks). Ruggie paraphrases Powell in defining “networks as “a collaborative form of organisation, based on complementary strengths, characterised by relational modes of interaction, exhibiting interdependent preferences, stressing mutual benefits, and bonded by considerations of reputation.” See Walter W. Powell, Neither Market Nor Hierarchy: Network Forms of Organization, 12 RESEARCH IN ORGANIZATIONAL BEHAVIOUR 295 (1990).

The idea of governance of public functions by shifting combinations of public and private actors is, of course, not entirely “new,” as suggested by the term “new governance” used by some scholars. See e.g., R.A.W. Rhodes, The New Governance: Governing without Government, 44 POLITICAL STUDIES 652 (1996). The blurring of the public and the private has long been an issue addressed by legal realists and law-and-society scholars. See e.g., Stewart Macaulay, Private Government, in LAW AND THE SOCIAL SCIENCES 445, 447-49 (Leon Lipson & Stanton Wheeler eds., 1986) (citing examples such as “company towns,” trade associations, internal corporate mechanisms for arbitration and protection against industrial espionage as examples of private actors performing government’s three primary functions— the creation and interpretation of rules, adjudication over their compliance, and the application of sanctions for non-compliance). See also Morton J. Horwitz, The History of the Public/Private Distinction, 130 U. PA. L. REV. 1423-28 (1982) (maintaining that the public/private distinction arose in order to define an area free from the influence of the state, and that the distinction has eroded as private entities have assumed more power); GERALD TURKEL, DIVIDING PUBLIC AND PRIVATE: LAW, POLITICS, AND SOCIAL THEORY (1992) (exploring critiques of the distinction by major social theorists). For German theoretical variants of a more abstract nature, see AUTOPOIETIC LAW : A NEW APPROACH TO LAW AND SOCIETY (Gunther Teubner, ed.,1988); and Niklas Luhmann, The Autopoiesis of Social Systems, in SOCIO-CYBERNETIC PARADOXES, (F. Geyer and J. van der Zouwen, eds., 1986). The blurring, however, becomes an increasingly problematic issue in modern, complex societies.

35 See, e.g., analysis in Philip Cerny, Paradoxes of the Competition State: The Dynamics of Political Globalization, 32 GOVERNMENT AND OPPOSITION 251 (1997). As Pollack and Shaffer point out, governance by networks has always existed, insofar as governments and international institutions cooperate with networks of public and private actors in the provision of public services. However, the adoption of privatization and deregulatory policies domestically, and the growth of cross-border trade in a world increasingly characterized by complex transnational interdependence, have led to a general movement towards governance by networks. Public institutions have adapted to these developments by shifting responsibility for the provision of many services to the private and voluntary sectors. See Pollack and Shaffer, TRANS ATLANTIC RELATIONS IN HISTORICAL AND THEORETICAL PERSPECTIVE, supra note..., at...
overseeing these private actors’ activities.\textsuperscript{36} According to a leading theorist of comparative politics, R.A.W. Rhodes, governance increasingly takes place through “self-organizing, interorganizational networks” composed of both public and private actors that intentionally pursue shared goals.\textsuperscript{37} Unlike in Weber’s and Dahl’s definitions of government, public actors no longer operate “exclusively” under this conception of governance. Non-governmental actors do not merely influence public representatives (as in Dahl’s notion of polyarchy) or respond to them (as in Weber’s concept of hierarchy). Rather, mixed networks of public and private actors coordinate in policy formation and implementation.\textsuperscript{38}

These mixed networks of government officials and private groups are brought together by resource interdependencies. As Rhodes points out, it is the diffusion of resources among various

\textsuperscript{36} See, e.g., DONALD KETTL, SHARING POWER 21 (1991) (noting that “government’s role has changed. Government is less the producer of goods and services, and more the supervisor of proxies who do the actual work.”).

\textsuperscript{37} See R.A.W. RHODES, UNDERSTANDING GOVERNANCE: POLICY NETWORKS, GOVERNANCE, REFLEXIVITY AND ACCOUNTABILITY 15 (1997); and R.A.W. Rhodes, THE NEW GOVERNANCE: GOVERNING WITHOUT GOVERNMENT, 44 POLITICAL STUDIES 660 (1996). More specifically, Rhodes lays out four basic characteristics of “governance,” which distinguish the term from the traditional notion of “government”:

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

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

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

(4) A significant degree of autonomy from the state. Networks are not accountable to the state; they are self-organizing. Although the state does not occupy a privileged, sovereign position, it can indirectly and imperfectly steer networks.” Id. As Rhodes writes elsewhere, governance by networks involves “a complex game,” one “in which all actors manoeuvre for advantage.” R.A.W. Rhodes, Introduction: The ESCR Whitehall Programme: a Guide to Institutional Change, in GOVERNING THE SUMMIT 11 (R.A.W. Rhodes ed., 2000).

\textsuperscript{38} Depending on the extent to which these networks are steered by government, governance by networks can be viewed as a form of oligopoly of the political marketplace, as opposed to a monopoly (i.e. Weber’s definition of government) and free competition (i.e. in an idealized market). See, e.g., R.A.W. RHODES, UNDERSTANDING GOVERNANCE: POLICY NETWORKS, GOVERNANCE, REFLEXIVITY AND ACCOUNTABILITY 9 (1997) (“Policy networks are one way of analysing aggregation and intermediation; the oligopoly of the political market-place.”). For a critical review of public-private interactions involving “regulatory capture,” see, for example, THEODORE LOWI, THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES (2\textsuperscript{nd} ed. 1979); H. Heclo, Issue Networks and the Executive Establishment, in THE NEW AMERICAN POLITICAL SYSTEM (A. King ed., 1978).
actors that explains the need for networked forms of governance in a world of growing complexity and numbers, since neither central governments nor any other single actor possesses the resources necessary to govern without the cooperation of others. Governments need informational resources that private actors provide. As Jan Kooiman states, “No single actor, public or private, has all knowledge and information required to solve complex, dynamic and diversified problems.” While Weber focused on a “bureaucratic organization’s” use of “knowledge” to exercise control, these scholars show how state agencies increasingly depend on private entities to obtain such knowledge and effectively deploy it in implementing policy. As Powell writes, “A basic assumption of network relationships is that one party is dependent on resources controlled by another, and that there are

39 See Rhodes, New Governance, supra note __, at __. An efficiency-based approach to governance by networks focuses on resource interdependencies as a causal explanation. Cf. Claire Cutler et al., The Contours and Significance of Private Authority in International Affairs, in Private Authority and International Affairs 337 (Claire Cutler et al. eds., 1999) (distinguishing between efficiency, power, historical approaches to explain the private authority in international affairs).

40 Jan Kooiman, Findings, Speculations and Recommendations, in Modern Governance: New Government-Society Interactions 252 (Jan Kooiman, ed., 1993). According to Kooiman, governance should therefore be conceived more broadly as the negotiated interactions of public and private actors in a given policy area. In his view, modern society is radically decentered, and government features as only one actor among many in the larger process of socioeconomic governance. See also Vincent Kouwenhovern, The Rise of the Public Private Partnership: A Model for the Management of Public-Private Cooperation, in Modern Governance, supra note __, at 119, 123 (“The rise of PPP [public-private partnership] during the middle of the eighties is therefore explained by the perceived recent increase of the recognition by government and the private sector of the necessity to channel, or even exploit, mutual interdependencies by means of cooperation.”).


42 Weber notes, however, that private business has superior knowledge in its field, an exception to bureaucracy’s source of power in the modern state through knowledge. See From Max Weber: Essays in Sociology 235 (H.H. Gerth & C. Wright Mills, eds., 1946) (“Only the expert knowledge of private economic interest groups in the field of ‘business’ is superior to the expert knowledge of the bureaucracy. This is so because the exact knowledge of facts in their field is vital to the economic existence of businessmen.”). Weber does, nonetheless, note the development of public-private interactions as a means to increase bureaucratic power, id. (“the system is supplemented by the calling in of interest groups as advisory bodies recruited from among the economically and socially most influential strata.... This latter development seeks especially to put the concrete experience of interest groups into the service of a rational administration of expertly trained officials. It will certainly be important in the future and it further increases the power of bureaucracy.”).
Of course, not all public and private actors enjoy equal opportunities to participate in these networks. The relative power and influence of actors within these networks is determined by the diffusion of resources and actors’ per capita stakes in outcomes. Actors may hold constitutional, legal, organizational, financial, political or informational resources. For example, public actors have constitutional and legal powers that provide them with authority. In the WTO context, only states may bring claims before the WTO dispute settlement body. Private actors thus depend on them to represent their interests. Private actors, however, also have organizational, financial, political and informational resources that can be of great use to public authorities. In the context of WTO dispute settlement, private associations have the financial means to hire legal experts to help develop legal arguments; hold essential information about the marketplace needed to develop a factual basis for legal claims; and deploy political resources through lobbying and campaign financial support. Public authorities rely on these various resources. In short, public and private actors reciprocally depend on each other to accomplish their respective goals.

Resources alone, however, are not sufficient to explain actors’ participation in mixed networks. Resources are limited and their deployment costly. Actors are more likely to deploy

\footnote{Walter Powell, \textit{Neither Market nor Hierarchy: Network Forms of Organization}, \textit{in} Markets, Hierarchies \& Networks: The Coordination of Social Life 265, 272 (Grahame Thompson et al. eds., 1991). For an application of this idea to lobbying, see e.g. Christine Degregorio, \textit{Assets and Access: Linking Lobbyists and Lawmakers in Congress}, \textit{in} The Interest Group Connection: Electioneering, Lobbying, and Policymaking in Washington 137, 139 (Paul Herrnson et al. 1998) (“Both lawmakers and lobbyists gain by entering into these policymaking partnerships. The advocates need accommodating leaders to interject their points into the formal decision-making process. Legislators need information, brokers, and confidants to help them build congressional support for passage. Because both parties to the exchange get something for their trouble, I call this explanation of events and exchange theory of access.”).}

\footnote{Rhodes focuses on the “distribution, and type, of resources within a network” in explaining “the relative power of actors. \textit{See} Understanding Governance, \textit{supra} note..., at 11.}

\footnote{For example, as Degregorio writes, “Organizational resources, such as money, staff, and members, for private-sector organizations, are the raw materials that can be transformed into assets of greater consequence.” Christine Degregorio, \textit{Assets and Access: Linking Lobbyists and Lawmakers in Congress}, \textit{in} The Interest Group Connection: Electioneering, Lobbying, and Policymaking in Washington 137, 146 (Paul Herrnsonet al. eds., 1998). As Alisdair Young points out, the logic of collective action also manifests itself in the resource/remit imbalance. Firms and trade associations have more money and often can concentrate their greater resources on more discrete-- sometimes technical-- issues than civic interest organizations. \textit{See} Alisdair Young, European Consumer Groups: Multiple Levels of Governance and Multiple Logics of Collective Action, \textit{in} Collective Action in the European Union 2, at 174 (Justin Greenwood \& Mark Aspinwall eds., 1988).}
resources when they have high per capita stakes in a given outcome. Those with low per capita stakes are less likely to engage in policy strategizing where the per capita benefits of fully understanding the issues and organizing themselves are too low to justify the costs. In contrast, groups with high per capita stakes are more likely to obtain and provide information to the policy-making process. Although this account of public-private interactions is less radical than a “public choice” one in which “law is traded for political support, money, power, and other things that politicians and bureaucrats demand,” high per capita stakes, intensive resource interdependencies, and the reciprocal interests of public officials and private firms together spur public-private collaborations.

At the international level, in the context of proliferating international organizational and

46 See e.g. MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION (1965); NEIL KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 3, at 8, 868 (1994) (“The character of institutional participation is determined by the interaction between the benefits of that participation and the costs of that participation.... Interest groups with small numbers but high per capita stakes have significant advantages in political action over interest groups with large numbers and smaller per capita stakes”). In short, the willingness of an actor to participate depends on both the per capita benefits from doing so, as well as the relative informational and organizational costs of so proceeding. A power-based approach to network analysis will focus on the characteristics of which private actors participate. See Cutler et al., Contours and Significance, supra note __, at 337.

47 Even where they could each benefit by collectively contributing to an association representing their interests, they may rather hope to free ride on others.


49 In international relations theory, some regime theorists such as Oran Young and postmodern theorists such as James Rosenau have included similar themes in their analysis of global governance. As Young writes, “At the most general level, governance involves the establishment and operation of social institutions—in other words, sets of rules, decision-making procedures, and programmatic activities that serve to define social practices and guide the interactions of those participating in these social practices... Politically relevant institutions or regimes... are arrangements designed to resolve social conflicts, promote sustained cooperation in mixed-motive relationships, and, more generally, alleviate collective-action problems in a world of interdependent actors.” Oran R. Young, Rights, Rules, and Resources in World Affairs, in GLOBAL GOVERNANCE: DRAWING INSIGHTS FROM THE ENVIRONMENTAL EXPERIENCE 4 (Oran R. Young ed., 1997). James Rosenau, Governance, Order and Change in World Politics, in GOVERNANCE WITHOUT GOVERNMENT: ORDER AND CHANGE IN WORLD POLITICS 4-6 (James Rosenau and Ernst-Otto Czempiel eds., 1992) (“governance is not synonymous with government. Both refer to purposive behavior, to goal-oriented activities, to systems of rule; but government suggests activities that are backed by formal authority, by police powers to insure the implementation of duly constituted policies, whereas governance refers to activities backed by shared goals that may or may not derive from legal and formally prescribed responsibilities and that do not necessarily rely on police powers to overcome defiance and attain compliance. Governance, in other words, is a more encompassing phenomenon than government. It embraces governmental institutions, but it also subsumes
legal structures, governmental representatives retain significant constitutional, legal and other resources. They thereby typically remain the most important players in public-private networks at this level. A number of scholars, such as Anne-Marie Slaughter, thus focus on the operation of “transgovernmental” networks of government officials as constituting “the real new world order.” Private actors, however, also play central roles in cross-border networks. As enterprises engage in cross-border exchange, their per capita stakes in international economic governance mechanisms rise. They press for greater legal certainty in export markets. Through their encounters with foreign regulatory barriers, they obtain valuable information which they have the incentive to package and forcefully present to domestic and transnational policy-makers. As firms and trade associations become repeat players in the challenge of foreign trade barriers, they develop a knowledge of how to strategically use the WTO process when needed. This book examines how private actors work with national officials in the WTO’s two most powerful and active members—the United States and

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50 See, e.g. Mark Pollack & Gregory Shaffer, Who Governs?, in Mark Pollack & Gregory Shaffer, Transatlantic Governance in the Global Economy, supra note, at 302 (in the context of transatlantic relations).

51 See, e.g., Anne-Marie Slaughter, The Real New World Order, Foreign Affairs 183 (1997); Anne-Marie Slaughter, Governing the Global Economy through Government Networks, in The Role of Law in International Politics 177, 178 (Michael Byers ed., 2000) (“The primary State actors in the international realm are no longer foreign ministries and heads of state, but the same government institutions that dominate domestic politics”). See also Youri Devyust, Transatlantic Competition Relations, in Transatlantic Governance, supra note..., at127; and Kal Raustiala, Transgovernmental Networks, International Cooperation and the Export of Regulation (manuscript on file concerning transgovernmental networks in competition, securities and environmental policy).

52 Private exporting firms and industry associations more easily form partnerships with national trade representatives in the context of WTO dispute settlement as opposed to trade agreement negotiations, since other domestic actors rarely have countervailing interests. Rather, only foreign constituencies are typically protected by the trade barrier in question. An example of public-private networks in WTO negotiations over intellectual property rights, see Susan Sell, Multinational Corporations as Agents of Change: The Globalization of Intellectual Property Rights, in Private Authority and International Affairs  169, 175 (Claire Cutler et al. eds, 1999).
European Community—to both enforce and shape public international economic law.\textsuperscript{53}

\textsuperscript{53} There are, in contrast, numerous works addressing the relation of private interests and public officials in the negotiation of international trade treaties and the provision of import protection. To name a few, see e.g., E.E. Schattschneider, Politics, Pressures and the Tariff (1935); Raymons Bauer, Ithiel de Sola Pool, and Lewis A. Dexter, American Business and Public Policy: The Politics of Foreign Trade (1963); I.M. Destler, American Trade Politics 7 (1995); and Judith Goldstein, Ideas, Interests, and American Trade Policy 137-163 (1993).
Chapter II. Public-Private Partnerships in the United States for Opening Foreign Markets: The United States’ Leading Edge

The United States was the first country under the GATT trading system to create a legalistic procedure whereby private firms could petition their government to challenge foreign trade barriers. Much has been written on this procedure, known as the Section 301 procedure, from a legal and normative perspective. In particular, scholars have focused on Section 301 as a coercive means for the United States to enforce its will unilaterally on other nations, and debated over whether its use has promoted or distorted trade liberalization goals. This book, in contrast, examines how Section 301 forms part of a much broader informal process of public-private networks behind U.S. challenges to foreign trade barriers. It focuses on Section 301 as a mechanism within a larger process of public-private exchange that facilitates the formation of ad hoc public-private networks to exploit public international law.

A. Historical and Contextual Background of Section 301: The Forging of Public-Private Partnerships

Sections 301-310 of the Trade Act of 1974 set forth a procedure whereby the USTR investigates and takes action against foreign trade barriers in response to petitions filed by private firms and trade associations. Section 301 expanded the focus of an earlier provision applying to...

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54 The GATT trading system refers to the system under the General Agreement on Tariffs and Trade signed in 1948, focusing on trade in goods. For an overview of the GATT system, see Kenneth Dam, The GATT (1970); and Robert E. Hudec, Enforcing International Trade Law: The Evolution of the Modern GATT Legal System (1993). Upon the creation of the WTO on January 1, 1995, the GATT became one agreement among many under the WTO’s umbrella, including agreements covering intellectual property protection and trade in services.

55 See Aggressive Unilateralism: America’s 301 Trading Policy and the World Trading System (Jadish Bhagwati & Hugh T. Patrick eds., 1990). As depicted in the title to this volume, Bhagwati views Section 301 largely as a mechanism for private interests to harness U.S. unilateral power, see id. at 35. (Section 301 “replaces economic efficiency with political clout as the determinate of exports in the world trading system”). Cf. Alan Sykes, Constructive Unilateral Threats in International Commercial Relation: The Limited Case of Section 301, 23 Law & Pol’y Int’l Bus. 263, 313 (1992) (concluding that the statute “is fairly successful at inducing foreign governments to modify their practices when they are accused of violating U.S. legal rights”); and Thomas Bayard & Kimberly Ann Elliott, Reciprocity and Retaliation in U.S. Trade Policy 351 (1994) (maintaining that Section 301 “can be a useful tool” to ensure WTO agreements are respected and “in encouraging additional liberalization in areas not covered by the WTO rules”). See also Alan C. Swan, “Fairness” and “Reciprocity” in the International Trade Section 301 and the Rule of Law, 16 ARIZ. J. INT’L & COMP. L. 37, 48-49 (1999).

56 The relevant provisions of the Trade Act of 1974, as amended, may be found at 19 U.S.C. §§ 2411–2420. Under Section 301, the USTR may also self-initiate an investigation, although such self-initiation is often done at the bidding of an industry or firm.
agricultural trade, in order to cover all goods and services “associated with” trade in goods. Congress subsequently further broadened the scope of Section 301 in successive amendments in 1979, 1984, 1988 and 1994, so that the statute now covers foreign barriers to investment, intellectual property protection, and trade in all goods and services. The amended provisions also tightened the requirements on the U.S. executive by establishing narrower deadlines and limiting the President’s discretion to avoid taking action following a Section 301 finding of a violation of a trade agreement or of a trade barrier which is not subject to an agreement but is nonetheless “unreasonable” and restrictive of U.S. commerce.

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

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57 Section 301’s immediate predecessor was Section 252 of the Trade Expansions Act of 1962. Enacted in response to new agricultural trade barriers under the EC’s Common Agricultural Policy, Section 252 authorized retaliation against unjustifiable foreign restrictions on U.S. agricultural exports. Section 252, however, was used only twice, once against the EC in response to EC variable tariffs on chicken exports, leading to the U.S.-EC “chicken war,” and once against Canada in response to Canadian restrictions on U.S. meat imports. See Robert E. Hudec, GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY (1975). Variable tariffs are those that vary (e.g. increase) as the volume of imports increase. Throughout U.S. history, in fact, Congress has delegated to the President the power to impose retaliatory duties and other import restrictions on countries that discriminate against U.S. products. See Raj Bhala, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE 1268 (2nd ed. 2000), (referring respectively to powers granted to President Washington, an 1890 statute upheld in the Supreme Court case Field v. Clark, 143 U.S. 649 (1892), and the U.S. trade acts of 1930 and 1934).


Congress hoped, was to expand Section 301 to target areas not yet covered by international trade rules that were of mounting importance to U.S. industry— in particular intellectual property protection and trade in services.60

A procedure, however, is of no value if it is not effectively used. Pressure from executive branch departments prioritizing Cold War foreign policy goals over the goal of expanding foreign market access constrained the use of Section 301.61 As the era of the Marshall Plan and U.S. post-war competitive dominance receded, private firms viewed the Department of State, which coordinated U.S. trade policy through the 1950s, as particularly problematic. They successfully lobbied Congress to create the Office of the United States Trade Representative in 1962 (originally named the State Trade Representative), then to raise the USTR post to a cabinet level position in 1974, and finally in 1988, to transfer authority for making Section 301 decisions from the President to the USTR.62


Section 301 can, in this sense, be viewed as a means to counter demands for greater protectionism. See Geza Feketekuky, U.S. Policy on 301 and Super 301, in Aggressive Unilateralism, supra note __, at 94-96. By acting more aggressively to challenge foreign trade barriers, advocates of open trade hoped to fend off pressures on Congress to raise U.S. protectionist barriers. See Destler, American Trade Politics, supra note __. This strategy is analogous to what has been called the “bicycle theory” of trade policy: “Unless there is forward movement the bicycle will fall over,” John H. Jackson, The World Trade Organization: Constitution and Jurisprudence 24 (1998). Some commentators have gone so far as to suggest that the Section 301 process constitutes less of a cooptation by business of U.S. government policy than a cooptation of business by the U.S. government. See, e.g., Gilbert R. Winham, International Trade and the Tokyo Round Negotiations 316 (1986) (citing one government official describing the cooptation as follows: “When you let a dog piss all over a fire hydrant, he thinks he owns it.”).

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

62 See Destler, American Trade Politics, supra note..., at 105-106. The USTR’s decisions, however, remained “subject to the specific direction, if any, of the President.” See Trade Act of 1974 § 301(a), 19 U.S.C. § 241 (1998). The transfer of authority to the USTR nonetheless permitted congressional committees to call before
Through these changes, firms and their congressional allies wished to shift power in executive branch deliberations from those agencies that focused on non-export goals (such as the Departments of State, Treasury and Defense and the National Security Council) to those more likely to defend private export interests (such as the USTR, and on agricultural matters, the Department of Agriculture). The Cold War’s demise facilitated this administrative reorganization.

In creating a more automatic Section 301 process presided by the USTR, Congress attempted to make the executive more “accountable” not only to Congress, but to industry. By enhancing USTR authority and constraining executive discretion, Congress has, over time, helped foster coordinated strategies between government and the private sector to pry open foreign markets. The USTR was to report not just to the President, but also to Congress. And organized industries ensured that Congress knew how the USTR was doing.

Because the United States aggressively challenges foreign market barriers, some commentators criticize U.S. trade policy as a tool for powerful business interests. Sylvia Ostry, former Canadian ambassador during the Uruguay Round trade negotiations, was widely quoted in maintaining, “America does not have a trade policy. It has clients.” Ostry implied that U.S. interests are up for sale, in particular to those funding presidential and congressional campaigns. The controlling shareholder of the Chiquita banana company, for example, was among the top three contributors to the Democratic and Republican parties in 1998. With congressional and executive

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

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

See Brian Morrissey, Protectionist Clouds Build, JOURNAL OF COMMERCE, April 26, 1999 (noting Lindner “has given $2.5 in campaign contributions over the past two election cycles,” during which time he has had breakfast with the then current USTR Mickey Kantor, coffee with Vice President Gore and spent a night in the White House’s Lincoln Room). The Center for Responsive Politics, a non-partisan and non-profit organization, reports that Carl Lindner contributed over $2.4 million over the 1996 and 1998 election cycles. Contribution information available at
support, the USTR reciprocated by dedicating tens of thousands of personnel hours challenging EC barriers to Chiquita banana imports. This involved four WTO panels, a total of over one thousand pages of written briefs, buttressed by thousands of pages of annexes, and an eventual settlement in Chiquita’s interest. Just as the USTR has fended for Chiquita’s bananas, so it has for Kodak’s film, cattlemen’s beef and Pfizer’s patents, bringing WTO claims on their behalf. Under this conception of privatized trade policy, if business is the USTR’s client, then campaign funds and related forms of consideration must constitute USTR’s legal fees.

In bringing a case under WTO rules, however, the USTR does not assume the traditional role of a private counsel vis-a-vis its client because the USTR cannot focus solely on winning a case through employing the strongest arguments. Rather, the USTR almost always has a conflict-of-interest with its “client” industry or firm. The USTR must consider potential cases in which other U.S. interests need be defended. Cases involving food and drug standards, subsidies and antidumping claims, to give just three examples, inherently raise these conflicts.

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<http://www.opensecrets.org/index.asp> There is further support for the impact of Mr Lindner in USTR’s decision to take up the case which has yet to be publicized. One former USTR official confirms that it certainly appeared that Mr Lindner hoped “to buy” the WTO case from the USTR. When former USTR Micky Kantor met in a key breakfast meeting with U.S. Republican Senate leader Robert Dole about Congress’ approval of the Uruguay Round Agreements Act pursuant to which the United States would join the WTO, Mr Linder allegedly was also present together with his outside counsel, Carolyn Gleason of the law firm McDermott Will & Emery. Senator Dole allegedly indicated to Mr Kantor that he liked the new draft of the Uruguay Round Agreements Act, and that he would like USTR to take up Chiquita’s case, which Ms Gleason could confirm was a strong one. The suggestion is that there was an understanding between Senator Dole and Mr Kantor that the chances of the Uruguay Round Agreement Act’s approval would be enhanced were USTR to take up Chiquita’s case. Not only was ratification of the WTO agreement’s at stake. Senator Dole, of course, ultimately ran against President Clinton in the next presidential election. Interview with a former USTR official in Washington DC (Oct. 18, 2001).

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

67 See Anthony DePalma, Dole Says Trade Accord on Bananas Favors Rival, NYT, April 14, 2001 (“Dole contends that the agreement favors Chiquita Brands International because it establishes a system under which European import licenses will be distributed based on import levels from 1994 to 1996. . . . Chiquita officials generally expressed satisfaction with the agreement . . .”).

68 For example, the United States was successful in bringing a claim against Australian leather subsidies, where the WTO dispute settlement panel held that Australia should reimburse the subsidies in question. While the U.S. leather industry would have approved of such a result, the United States was uncertain as to how to proceed, as its preferential tax system for “foreign sales corporations” had also been found to be WTO non-compliant, and the United States did not wish to refund these, which were estimated to involve billions of dollars. See, e.g. Daniel Pruzin, U.S. Puts Off Retaliation Decision in Australian Car Leather Complaint, and Barshefsky Pledges to Reach
Under the current international system, the relation of U.S. private interests and public authorities is neither as Ostry suggests, that of lawyer-client, nor, as many trade liberals desire, that of firms acting independently of government.\footnote{Some trade liberals maintain that the defense of private trading rights should be the trading system’s driving normative goal. They assert that the WTO system is currently insufficient because it does not require that member states permit commercial and consumer interests to directly invoke WTO rules before member state courts. See, e.g., Ronald Brand, \textit{GATT and United States Trade Law: The Incomplete Implementation of Comparative Advantage Theory}, 2 J. LEGAL ECON. 95, 95-102 (1992); \textsc{Ernst-Ulrich Petersmann}, \textit{Constitutional Functions and Constitutional Problems of International Economic Law} 463 (1991).} Rather, 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. The separate, reciprocal, overlapping interests of the USTR and the private sector give rise to \textit{ad hoc}, hybrid public-private networks. The USTR depends on private sector lobbying in order to obtain support in Congress and the administration for adopting USTR policy goals and supporting USTR practical needs, from the granting of “fast-track” negotiating authority\footnote{“Fast track” negotiating authority refers to a procedure whereby Congress grants the executive authority to negotiate trade liberalization agreements under prescribed mandates and subject to congressional oversight, pursuant to which, once an agreement is signed, Congress cannot amend it, but must approve or reject it by an up or down vote. For an overview and assessment of “fast track,” see Harold Hongju Koh, \textit{The Fast Track and United States Trade Policy}, 18 BROOK. J. INT’L L. 143 (1992).} and the ratification of trade agreements,\footnote{The history of U.S. private sector support of the ratification of trade agreements was not new to the 1990s. As Alan Wolff, a former member of the USTR and now member of the private trade bar, wrote as regards U.S. ratification of the 1979 Tokyo Round agreements, the overwhelming congressional support was attributable in large part “to the laborious process of private sector consultation, in which... trade officials and industry representatives worked closely together to promote U.S. commercial interests.” Alan Wm. Wolff, \textit{International Competitiveness of American Industry: The Role of U.S. Trade Policy}, in U.S. COMPETITIVENESS IN THE WORLD ECONOMY 301, 320-321 (Bruce R. Scott & George C. Lodge, eds., 1985).} to approving the accession of China to the WTO\footnote{See, e.g., \textit{Administration Reaches out to Business on Upcoming China MFN Vote}, 17 INSIDE U.S. TRADE 1 (Dec. 24, 1999); Richard W. Stevenson, \textit{White House and Business Groups to Push Congress on China Pact}, N.Y. TIMES, Nov. 16, 1999, at A1, 10 (quoting L. Craig Johnstone, senior vice president for international economic and national security affairs at the United States Chamber of Commerce. who stated “We were asked by the administration if we could deliver the votes,” said L. Craig Johnstone, “We said we could and we will.”).} and the allocation of budgetary funds.\footnote{In particular, the USTR depends on export-

\textit{out on FSC after Appellate Body Decision}, INSIDE U.S. TRADE 5, Feb. 11, 2000; and 17 INT’L TRADE REP. 469 (March 23, 2000). For an example involving U.S. “Corporate average fuel economy” standards, \textit{see infra} note\footnote{See, e.g., \textit{Administration Reaches out to Business on Upcoming China MFN Vote}, 17 INSIDE U.S. TRADE 1 (Dec. 24, 1999); Richard W. Stevenson, \textit{White House and Business Groups to Push Congress on China Pact}, N.Y. TIMES, Nov. 16, 1999, at A1, 10 (quoting L. Craig Johnstone, senior vice president for international economic and national security affairs at the United States Chamber of Commerce. who stated “We were asked by the administration if we could deliver the votes,” said L. Craig Johnstone, “We said we could and we will.”).} and accompanying text. For an example involving copyright legislation, \textit{see infra} note\footnote{See, e.g., \textit{Administration Reaches out to Business on Upcoming China MFN Vote}, 17 INSIDE U.S. TRADE 1 (Dec. 24, 1999); Richard W. Stevenson, \textit{White House and Business Groups to Push Congress on China Pact}, N.Y. TIMES, Nov. 16, 1999, at A1, 10 (quoting L. Craig Johnstone, senior vice president for international economic and national security affairs at the United States Chamber of Commerce. who stated “We were asked by the administration if we could deliver the votes,” said L. Craig Johnstone, “We said we could and we will.”).} and accompanying text.}
oriented industries to have their employees and management write, call or otherwise lobby congressional representatives to support USTR’s positions. Following the USTR’s successful litigation on behalf of the U.S. spirits industry in the Japan and Korea alcohol cases in 1996 and 1998, the Vice President of the Distilled Spirits Council of the United States (DISCUS) correspondingly testified before the Senate Committee on Finance, “The WTO has played an integral role in our members’ efforts to reduce or eliminate trade barriers and expand their imports to foreign markets.” DISCUS urged Congress “to provide the political and statutory authority [i.e. fast-track] required to strengthen and expand the WTO and reaffirm the leading role of the United States in the international trading system.”

In return, the Office of the United States Trade Representative aggressively defends industry interests, be it in multilateral or bilateral trade negotiations, WTO accession negotiations, or WTO litigation. USTR also provides exporting industries with a voice in interagency debates so that the President considers their desires when balancing multiple U.S. interests. When the process is successful, the President and other senior officials promote issues on industry’s behalf at the highest level, as when President Clinton raised pharmaceutical patent protection issues during his 1999 visit

See, e.g., House Appropriations Subcommittee Funds Trade Agencies, INSIDE U.S. TRADE 3 (June 9, 2000) (noting cut in funds to the International Trade Commission on account of lobbying “from lawyers representing integrated steel producers” and increase in USTR funds, though not as much as requested).

See, e.g. MICHAEL GILLIGAN, EMPOWERING EXPORTERS 135-137 (1997) (concerning the importance of exporter lobbying for changing legislator’s preferences).

See also Julie Kosterlitz, Trade Crusade, 30 National Journal 1054 (May 9, 1998) (concerning corporate initiatives in support of educating the public about the virtues of the global economy and free trade policy).

See, e.g., Ukraine Named ‘Priority Foreign Country’ under USTR’s ‘Special 301’ IPR Provision, 18 INT’L TRADE REP. (BNA) 429 (March 15, 2001) (quoting the reaction of Eric Smith, President of the International Intellectual Property Alliance, “The U.S. government put enormous resources into the effort to convince Ukraine to take action. We thank them for their support.”).
with Nelson Mandela in South Africa. Yet, other countervailing forces may also intervene, be it lobbying by other commercial interests, such as the generic drug industry, or by activists promoting noncommercial causes, such as the provision of low-cost drugs to African AIDS victims.\textsuperscript{77} Despite what some commentators suggest, firms are not “clients” that can dictate USTR actions, and the USTR is not a gun for hire. Firms must rather continually negotiate \textit{ad hoc} partnerships with the USTR, collaborating with the USTR where their interests coincide and domestic politics permits.\textsuperscript{78}

Over time, this interaction of public and private actors has intensified on account of structural changes from above (the relative legalization of the international trading system) and pressure from below (firms more aggressively demanding the removal of foreign trade barriers as they become more dependent on cross-border trade and investment in a globalizing economy). Section 301 constitutes a specific legal provision for private solicitation of public assistance on trade matters. However, it is also much more. Section 301 forms part of a larger informal process of national public and private actors—holding interdependent resources—working through networks to advance their reciprocal interests in a globalizing economy. They do so by deploying and operating in the shadow of public international law.

\textbf{B. Overview of the Operation of Section 301 and Interagency Trade Committees.} Section 301 of the 1974 Trade Act sets forth four grounds pursuant to which the USTR may bring a WTO


\textsuperscript{78} This book’s analysis of the reciprocal relationship between public and private interests in the law and politics of international trade is somewhat analogous to that of the political realist Robert Gilpin’s analysis of the relationship between public and private interests in the economics and politics of foreign direct investment. \textit{See} ROBERT GILPIN, U.S. POWER AND THE MULTINATIONAL CORPORATION: THE POLITICAL ECONOMY OF FOREIGN DIRECT INVESTMENT 140 (1975) (stating “corporations and the U.S. government have tended to share an overlapping and complementary set of interests”). Gilpin also notes, “The relationship between economics and politics, to restate the theme of this book, is a reciprocal one,” \textit{id. at} 41.
complaint or otherwise respond (and possibly retaliate) against a foreign country practice that restricts U.S. exports. Two of the grounds formally require “mandatory action,” and respectively concern the violation of “any trade agreement” or the violation of any “international legal rights of the United States.” In practice, at least as regards the WTO’s 144 members, these “mandatory” grounds should be based on alleged violations of one of the WTO’s 19 substantive agreements. The remaining two grounds are listed under a section entitled “discretionary action,” and respectively grant the USTR the power to take action where a foreign practice “restricts United States commerce” and is either “discriminatory” or “unreasonable.” The term “unreasonable” has been used since the original 1974 version of Section 301, but was left undefined until 1984. In 1988, the definition was expanded to comprise any act that is “unfair or inequitable,” including the following potpourri of examples:

“(i) [denial of] fair and equitable—
   (I) opportunities for the establishment of an enterprise,
   (II) provision of adequate and effective protection of intellectual property rights
      notwithstanding that the foreign country may be in compliance with specific
      obligations of the [TRIPS Agreement]..., 
   (IV) market opportunities, including the toleration by a foreign government of
      systematic anti-competitive activities..., 
   (ii) constitutes export targeting, or
   (iii) constitutes a persistent pattern of conduct that—
      (I) denies worker the right of association,... [and a list of other labor rights].”

79 See Trade Act of 1974, § 301(a), 19 U.S.C §2411(a).

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

81 See Trade Act of 1974, § 301(b), 19 U.S.C § 2411(b).
Foreigners criticize these discretionary grounds, in particular, because they open-endedly grant authority to the USTR to impose unilateral trade restrictions on account of a practice that irks some U.S. producer interest, but does not violate any WTO or other legal obligation. As an EC representative states, “Section 301 was designed to be unilateral.”

In 1988, under congressional pressure to respond to the United States’ growing trade deficit, in particular vis-a-vis Japan, the Reagan administration agreed to further toughen Section 301 by adopting three new mechanisms, known as Super 301 (which targets “priority” foreign practices), Special 301 (which targets intellectual property protection in “priority foreign countries”), and telecom 301 (which targets “priority” foreign telecommunications markets). Telecommunications firms and firms relying on intellectual property were a driving force behind these provisions, as they exercised increasing political clout in the United States. After the USTR obtained private sector support, the administration developed a sliding scale under Super and Special 301 whereby the government would prioritize relevant countries and practices by placing them in one of three categories: (i) “priority” countries and practices; (ii) those on a “priority watch list;” and (iii) those on a “watch list.” As examined below, private firms have attempted to use these categories and the

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


84 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.” See Trade Act of 1974, 19 U.S.C. § 2420(a)(1)(B). While Congress provided for no termination date for Special 301 and telecom 301, it initially created Super 301 for a two year period. President Clinton continued it by executive order during most of his time in office. Super 301 was reinstated through 2001-2002 by Executive Order in March 1999. The Bush administration is deciding whether to continue it. See USTR to Weigh Changing Annual Reviews of Foreign Trade Practices, INSIDE U.S. TRADE 16 (May 4, 2001).

85 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.” See id. 19 U.S.C. § 2242.

86 See id. 19 U.S.C. § 3106.

deadlines built into the process to steadily jack up pressure on foreign countries to change their regulatory behavior. If a country or a country’s practice is listed in the “priority” category, the United States is likely to forthwith file a WTO claim or take unilateral retaliatory action.88

In deciding whether to initiate an investigation into a trade matter, the Office of the United States Trade Representative does not act alone, but must work through an interagency process. The relevant interagency committees are the “Section 301 committee” and the “Special 301 committee,” which bring together lower level officials from most federal agencies, including the Departments of State, Treasury, Commerce, Defense, Agriculture and Transport, the National Security Council, the Food and Drug Administration and the Environmental Protection Agency. A USTR representative chairs the meetings, and is typically viewed by firms as their primary supporter in the process. If these agency officials do not agree on a matter, they refer it to committees assembling more senior officials (named in order of referral, the Trade Policy Staff Committee, the Trade Policy Review Group and, ultimately, members of the President’s cabinet). In practice, the lower level Section 301 and Special 301 committees avoid referral by obtaining guidance informally from their superiors.89

Overall, Section 301 does not so much provide a legal right, as it represents a process of public-private collaboration in fact-gathering, strategizing, negotiating, and (potentially) litigating over foreign trade restrictions.90 Despite some of its “mandatory” language, Section 301’s legal criteria remain sufficiently subjective to grant the interagency committees considerable discretion whether or not to take action. As former USTR Robert Strauss remarked, Section 301 is “mandatory but not compulsory.”91 Even in “mandatory” cases, there is a gaping hole in the procedure since the

88 As for unilateral actions that the United States may take without risking WTO-authorized sanctions, see infra note... and accompanying text.

89 Interview with former chair of Section 301 committee, May 14, 1999. Confirmed by Irving Williamson, another former chair of the Section 301 Committee (May 17, 1999) [Hereinafter Williamson Interview, May 1999].

90 As the trade lawyer Richard Cunningham writes, “the petitioning company or industry must develop the facts necessary to demonstrate the existence and effect of the foreign unfair practice. Although Section 301 contains references to an ‘investigation,’ neither USTR nor any other government agency in fact conducts--or has the resources to conduct--any meaningful investigation.” See e.g. Richard Cunningham, Trade Law and Trade Policy: The Advocate’s Perspective, in CONSTITUENT INTERESTS IN U.S. TRADE POLICIES 263, 282 (Alan Deardorff & Robert Stern eds., 1998).

91 Bello & Holmer, supra note__, at 12.
USTR retains discretion whether to commence an investigation in the first place. In the statute’s twenty-five year existence, no administrative decision involving a Section 301 private petition has been subjected to judicial review because, in practice, private firms and the USTR informally coordinate a strategy before any formal petition is filed or investigation commenced. If firms are to successfully challenge a foreign market barrier, they must necessarily rely on U.S. public authorities to ultimately represent their interests. They thus work the Section 301 process with the USTR as a network partner, and not as a bureaucracy whose actions they can force through a domestic legal proceeding. In short, what is referred to as “Section 301” should be viewed as a process of public-private collaboration more focused on problem-solving than on litigation, a process in which formal Section 301 legal investigations are just one means of leverage amongst a larger arsenal.

C. The Strategic Use of the Process by Firms. Successfully working the Section 301 process to liberalize foreign trade 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. This section addresses how private firms make use of the process–its law-in-action.

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. Even where there is a dominant firm, it may act under the gloss of an industry

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

93 See Bhala and Kennedy, supra note __, at 1045-47 (discussing criteria under which a Section 301 determination could potentially be subject to judicial review). In support of judicial review of Section 301 determinations, see Erwin Eichman & Gary Horlick, Political Questions in International Trade: Judicial Review of Section 301?, Mich. J. Int’l L. 10 (1989); and Kevin C. Kennedy, Presidential Authority under Section 337, Section 301 and the Escape Clause: The Case for Less Discretion, 127 Cornell Int’l L. J. 20 (1987). In opposition, see Robert E. Hudec, Thinking about the New Section 301: Beyond Good and Evil, in AGGRESSIVE UNILATERALISM, supra note __, at 113, 122.
association. Firms thereby present a united industrial front, maintaining that they represent a broader national interest. They may also more effectively rally political support in Congress where needed.

There are trade associations for just about everything in Washington, which now total more than 23,000 national associations and 64,000 regional, state and local associations. Just to cover the capital’s daily special of pork, milk and corn, there are the National Pork Producers Counsel, the National Milk Producers Foundation and the Corn Refiners Association. For firms relying on intellectual property protection, there are the Pharmaceutical Research and Manufacturers of America (PhRMA), representing the pharmaceutical industry, and the International Intellectual Property Association (IIPA), representing the publishing, film, recording and software industries. Firms also form *ad hoc* associations targeting specific foreign practices: witness the Coalition against Australian Leather Subsidies. The Coalition brought a Section 301 petition on August 19, 1996 challenging Australia’s grant of subsidies to its leather industry, a petition that the USTR used to negotiate Australia’s termination of subsidies. Yet, since the Coalition remained unsatisfied, it pressed the USTR to successfully bring a WTO case in May 1998 against Australia’s remaining subsidies for “automotive leather,” which Australia agreed to remove in 1999.

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94 For example, one former USTR official points out that Arthur Daniel Midlands is the largest party in the Corn Refiners Association and Seagrams the largest in the distilled spirits trade association. The former official notes how dominant firms “can make it tough” for trade association representatives. Interview in Washington DC (Oct. 18, 2001). The association representative often acts similarly to “guys in our foreign embassies,” having to explain how Washington works back in Peoria and explain to Washington what Peoria wants.


96 PhRMA does not include generic drug companies. The IIPA coalition is comprised of the Association of American Publishers Inc., the American Film Marketing Association, the Business Software Alliance, the Interactive Digital Software Alliance, the Motion Picture Association of America, Inc., the National Music Publishers Association, Inc. and the Recording Industry Association of America, Inc. See International Intellectual Property Alliance (visited Jan. 16, 2002) <http://www.iipa.com>

97 However, the U.S. was still unsatisfied with Australia’s implementation of the panel decision, stating that the entire grant package had not been repaid to the government by the Australian beneficiary of the subsidy. *See* Daniel Pruzin, *U.S. Australia to Renew WTO Battle over Automotive Leather Export Subsidies*, 16 INT’L TRADE REP. (BNA) 1632-33 (Oct. 13, 1999). On June 21 the United States and Australia reached a settlement in which
WTO cases increasingly demand significant time, expense and effort. The USTR is unlikely to expend scarce resources and limited political capital within the U.S. interagency process and vis-a-vis foreign governments when a claim does not have broad sectoral support. Where the USTR agrees to form an ad hoc public-private network on a specific trade matter, it wants a strong partner. Large and well-organized commercial interests, including groupings of smaller enterprises through effective trade associations, are, as a result, relatively more successful in working the process.98

2. Public-Private Exchange of Information. Firms do not simply “buy” USTR assistance through collectively garnering Congressional backing. To convince the Office of the United States Trade Representative to take a case to the World Trade Organization, a firm must normally present the USTR with a strong legal case supported by a detailed factual record.99 The USTR wants a strong partner not only in terms of ensuring broad industry support; it wants a winning case. The USTR does not want to waste its resources, impair its international credibility, and tarnish its reputation before Congress by bringing and then losing a weak legal case before the WTO.100 Some in the Washington trade bar maintain that the Japan-Photographic Film case—also known as the Kodak-Fuji

98 By well-organized, I include small companies that effectively work through trade associations, as with the computer software industry. Nonetheless, as Richard Cunningham, a trade lawyer at Steptoe & Johnson, points out, if the countervailing interests are also large, as in the Boeing-Airbus rivalry, it will be more difficult for the USTR to take up a claim, whereas the USTR may bring a claim on behalf of a smaller, albeit organized interest, because the claim is “too small to make waves.” Cunningham notes, as an example, the Section 201 case brought by Harley Davidson resulting in “41% duties” against Japanese imports. Interview in Washington DC (Oct. 18, 2001).

99 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.

100 See Bello, Some Practical Observations, supra note __ (noting how administrative officials “tend to be institutionally risk-averse,”... and thus “are likely to feel substantial pressure to win any challenge they elect to make of another government’s practice under any of the WTO agreements.”). As an official at USTR states, USTR wants a commitment from firms to respond to “time-sensitive demands for materials from [WTO] panels.” Interview in Washington DC (Oct. 18, 2001).
case after the firms behind the “intergovernmental” suit—exemplifies what can go wrong when the USTR pursues a WTO case for political reasons. The United States (and Kodak) lost the case at a vast expense of resources, which left the USTR on the defensive when it then requested Congress to grant it fast-track authority to negotiate new trade agreements.\(^{101}\)

Building a strong legal case requires an intensive exchange of information between the relevant public authority (USTR) and private firms. The process begins with the identification of foreign trade barriers and culminates in a negotiated settlement or the bringing of a WTO complaint, and, if successful, the monitoring of compliance. The USTR has limited resources, in particular to compile and organize the factual basis for a successful WTO complaint. It thus relies on industry assistance.\(^{102}\) Since U.S. industries, in turn, rely on the USTR to defend their interests under WTO law, they are pleased to oblige. If USTR is unsatisfied with the factual dossier provided, it asks for new information that it can more effectively use. Firms are, in many ways, the USTR’s eyes. Although U.S. embassies may help compile information, firms know best the impact of a trade restriction on the market in which they operate or wish to enter.

Large and well-organized firms are often repeat players who, over time, learn to work the system.\(^{103}\) As firms become experienced with the process, they increasingly anticipate what USTR needs. The process becomes routinized. In particular in the area of intellectual property protection, industry associations gather and compile information well in advance of the USTR’s annual notice in the Federal Register requesting assistance in identifying and prioritizing foreign trade barriers.\(^{104}\) 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

\(^{101}\) As the trade lawyer Richard Cunningham confirms, “The Kodak case was a very chilling experience for USTR.” Interview in Washington DC (Oct. 18, 2001).

\(^{102}\) See, e.g., Rossella Brevetti, \textit{Lawyer Sees Growing Role for Private Counsel in WTO Cases}, 18 INT’L TRADE REP. (BNA) 720 (May 3, 2001) (reporting remarks of Geralyn Ritter, attorney at the Washington DC firm of Covington & Burling, who noted “increasingly significant” role of private counsel in WTO cases, since government agencies handling WTO matters are “extremely short-staffed” and in particular, lack “access to the facts.”).


gathered, the IIPA prepares a detailed submission to the USTR in early February of each year focusing on copyright “piracy” and inadequate copyright enforcement around the world. In its report, the IIPA stresses the loss of high-wage U.S. jobs and billions of dollars of revenue to the U.S. economy (and implicitly, to the Association’s members). Each February, for example, the Association has submitted a six-hundred page report that specified how USTR should prioritize countries in its final Special 301 report—categorizing countries as priority foreign countries, countries on the priority watch list, and countries on the watch list. According to an IIPA representative, the Association’s success in influencing U.S. governmental priorities is demonstrated by the similarity between the IIPA’s initial submissions and the government’s ultimate findings in the 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, the IIPA wants USTR to choose cases that it can clearly win under the TRIPs Agreement (the Agreement on Trade-Related Aspects of Intellectual Property Rights).

The USTR uses the submissions of private firms to pressure foreign governments to change

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

106 Interview with IIPA representative (May 17, 1999) [hereinafter IIPA Interview, May 1999].

107 Interview with member of Washington trade bar (May 20, 1999). Similarly, in terms of U.S. domestic constitutional law cases, “cases do not arrive at the door steps of the Supreme Court like orphans in the night.” There are usually organized interests behind them, often bringing them as test cases. See Richard Cortner, THE SUPREME COURT AND CIVIL LIBERTIES POLICY iv (1975). In fact, as Epstein points out in regards to U.S. constitutional law litigation, “[although] conventional wisdom certainly holds that public interest groups and civil rights/liberties groups dominate litigation,... they are far from the leading participants. That distinction belongs to commercial groups and governmental interests.” Lee Epstein, COURTS AND INTEREST GROUPS, IN THE AMERICAN COURTS: A CRITICAL ASSESSMENT (eds. John Gates and Charles Johnson, 1991), at 355.
their practices prior to USTR publishing its annual reports. The process is constructed to stimulate negotiations. This often results in a fight over the facts well before the USTR initiates a Section 301 investigation or files a complaint at the World Trade Organization.108 The debate over the facts involves not only U.S. and foreign governmental representatives, but also U.S. (and sometimes foreign) firms and their legal representatives.109 If the foreign government does not undertake to change its practices or otherwise convince USTR that the U.S. industry has misrepresented the facts, it is listed in the relevant report, which, in turn can trigger the filing of a WTO complaint.

3. Working the Interagency Process. Once the trade association compiles the relevant information, it attempts to “educate” the members of the interagency 301 Committee about the facts. Other than for agricultural matters,110 associations typically start with the Office of the United States Trade Representative since the USTR leads the interagency process and is viewed as their ally and primary partner in the process. Associations, sometimes in coordination with their member firms, pay periodic visits to every agency representative on the Section 301 committee, as well as their superiors within these agencies. Since there are divisions within, as well as between government agencies, an industry needs to create strong working relationships with key contacts in each agency in order to teach them to appreciate—and support—industry’s concerns.111 Firms deploy their informational resources to persuade public authorities to work on their behalf.

Firms most frequently cite the Departments of State, Treasury and Defense as “problem agencies.” Treasury may oppose challenging a foreign trade barrier because an aggressive trade action could interfere with Treasury’s efforts to shore up a country’s financial system. The Defense Department will not want to compromise its use of air bases in Turkey over complaints about

108 IIPA Interview, supra note __.

109 See infra note__

110 The U.S. Department of Agriculture takes the lead role in defending the interests of U.S. agricultural producers.

111 Confirmed in interviews with trade association representatives in the intellectual property and food industries, as well as Washington trade lawyers (May 17-20, 1999). The Department of Commerce is typically a friendly agency, sometimes referred to as a “clientele” agency for firms. See, e.g., LOWI, THE END OF LIBERALISM, supra note..., at 77-78.
“pirated” Disney videos or Puff Daddy compact discs, no matter how valuable they may be to a U.S. industry or firm.

Trade associations are generally most concerned with the Department of State. There is an old saying among Washington lobbyists that, “In the Department of State you can find a desk for every country in the world except for the America desk.”112 Ambassadors are promoted because they are “diplomatic” and maintain good relations with officials of the countries where they are based. Associations report that they often must work to counter (what they term) “misinformation” provided by a foreign country desk in the Department of State, forwarded from a U.S. foreign embassy, which in turn was obtained from foreign government sources.113

The dialogue over trade barriers, in other words, becomes more than an intergovernmental one. It involves private firms debating factual and legal issues with representatives of multiple U.S. agencies and foreign government officials. Foreign firms often hire Washington lawyers to present their version of events, further complicating the process. In the Kodak-Fuji case, for example, Fuji hired a U.S. law firm to respond to Kodak’s Section 301 petition at the U.S. national level, and, ultimately, to assist it (and Japan) in the WTO intergovernmental procedure. The combined legal fees of Dewey Ballantine (for Kodak) and Willkie Farr & Gallagher (for Fuji) were estimated to exceed U.S. $12,000,000 in that case.114 The fight over the facts, occurring throughout the Section 301 and WTO process, can be an expensive one, favoring large or well-organized commercial interests.115

4. Inciting Congressional Pressure. Industry, however, does not solely rely on persuasion of

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

113 Interview with representative of intellectual property trade associations (May 17, 1999).


115 This is certainly true in cases involving large multinationals (such as Chiquita) or of well-organized interests (such as software and other IP companies that work through trade associations). Nonetheless, smaller associations can also make use of the system, as in the 301 case brought by the Border Waters Coalition Against Discrimination in Services Trade. See Canada and Practices Affecting Tourism and Sport Fishing (301, case 119), (visited Dec. 10, 2001)<http://www.ustr.gov/enforcement/tradelaw.shtml>.
agency representatives about the facts. Firms work the political process as well, contacting congressional representatives directly and in coordination with industry associations, whether through their own "government affairs" divisions or through hiring outside lobbyists.\textsuperscript{116} Firms press their case to local congressional representatives and those on the international trade subcommittees of the Senate Finance Committee and the House Ways and Means Committee. Local congressional representatives, in turn, also pressure members of these committees. Whenever a USTR official visits Congress, congressional representatives raise specific trade matters—whether about meat, steel rods or raw hide leather—however unrelated to the meeting’s agenda. In the WTO 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.\textsuperscript{117} When the EC did not comply with the WTO Appellate Body’s ruling, Congressional representatives drafted legislation that would have compelled the USTR to retaliate had the President not responded by committing to retaliate on his own. To assure a doubting Congress, a vulnerable President Clinton was compelled to confirm this undertaking by letter to the Senate Majority Leader and the Speaker of the House.\textsuperscript{118}

In the WTO meat hormones case, the beef industry likewise pressured the USTR to take its case to the WTO and to retaliate against the EC for failing to comply with the WTO Appellate

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\textsuperscript{116} Many of the leading outside lobbyists in Washington are law firms with major international trade practices. For example, in terms of first semester 1999 lobbying receipts, Patten, Boggs was rated number two, Akin, Gump, Strauss, Hauer & Feld, number five, and Hogan & Hartson number seven among lobbying firms in Washington. \textit{See} Mel Lewis, \textit{Spheres of Influence Grow in Washington}, N.Y. \textit{TIMES}, Nov. 16, 1999 at C1, C27. Former USTR and Democratic National Committee Chairman Robert Strauss is a name partner and leading lobbyist at Akin, Gump, Strauss, Hauer & Feld. David Aaron, former Undersecretary of Commerce of International Trade and a non-lawyer, joined Dorsey & Whitney in Washington in March 2000. \textit{See Aaron to Leave Commerce Dept. in March for Law Firm.} Hogan & Hartson even wooed Hugo Paemen, the EC’s chief ambassador during the Uruguay Round and then chief of the Commission’s Washington delegation, to join it at the end of 1999. \textit{See W. John Moore, Trans-Atlantic Clout}, National Journal 421, Feb. 5, 2000 and \textit{Former Head of EC Washington Delegation Joins Hogan & Hartson}, INSIDE U.S. TRADE 14 (Dec. 10, 1999).
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\textsuperscript{117} Interview with the House staff member to the House subcommittees (May 20, 1999).
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\textsuperscript{118} \textit{See} Marc Selinger, \textit{Clinton Averts Vote on EU Trade}, WASH. TIMES, October 13, 1998, at B9. President Clinton was particularly politically vulnerable at the time, autumn 1998, in the wake of the Monica Lewinsky scandal and House impeachment hearings. At one point, Senator Trent Lott, the majority leader, even attached a legislative rider that would “require industry approval of any trade deal the U.S. negotiates to reduce sanctions against the European Union for the Commission’s beef and banana policies,” but this did not pass. \textit{See Lott Rider Faces Fierce Opposition from Lawmakers, Others}, 18 INSIDE U.S. TRADE 1 (Oct. 27, 2000).
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Body’s ruling. The beef industry’s trade organizations—the American Meat Institute, the National Cattlemen’s Association and the U.S. Meat Export Association—orchestrated a country-wide press on the USTR.\textsuperscript{119} With members throughout the country, the beef industry could request large numbers of congressional representatives to demand action. As one USTR representative stated, “We know the intensity of the issue by how we are approached. A phone call from a Congressman means a lot more than a letter.” Phone calls from Congressmen throughout the country mean even more.\textsuperscript{120} The threat of draft legislation forcing the USTR to act is perhaps most persuasive. Industries with significant operations in politically important states—such as California, New York, Texas and Florida—can, in particular, effectively work the political process.\textsuperscript{121}

Congress retains a number of devices to pressure the USTR on industry’s behalf in addition to threatening to pass legislation compelling action.\textsuperscript{122} Even were the President to veto such legislation, Congress can make the administration’s life difficult. The USTR may rely on a congressional representative’s support for a renewal of “fast-track” negotiating authority or for a vote on Chinese accession to the World Trade Organization. Similarly, a key congressional representative could withhold support for funding a new USTR hire, or for promoting a USTR official to a senior post. Firms attempt to use political leverage where helpful to facilitate and enhance their position in public-private trade networks.

5. The Use of Leverage Points: Publishing Reports and Initiating Investigations. The exercise of power ultimately concerns “who can influence whom to do what?”\textsuperscript{123} The overall Section 301 process is designed to establish a series of leverage points for U.S. public-private networks to

\textsuperscript{119} Interview with representatives of the Cattlemen’s trade association (May 20, 1999).

\textsuperscript{120} Interview with USTR official (May 14, 1999).


\textsuperscript{122} William Gormley notes how “legislative oversight of the bureaucracy can be effective” including through “threat of electoral or budgetary reprisals.” William Gormley, Interest Group Interventions in the Administrative Process: Conspirators and Co-Conspirators, in THE INTEREST GROUP CONNECTION, supra note..., 213, 214-215.

\textsuperscript{123} See ROBERT GILPIN, U.S. POWER AND THE MULTINATIONAL CORPORATION 37(1975) (noting the psychological dimensions of power).
pressure foreign governments to change their trade policies and practices. These leverage points include the following:124 (i) the deadline for private submissions of information to the USTR concerning foreign trade barriers, which are provided in anticipation of the USTR’s annual trade reports to Congress; (ii) the deadline for the publication of such USTR reports which, in turn, prioritize countries and their practices; (iv) the deadline for initiating and concluding Section 301 investigations; and (v) the many deadlines in the WTO system for consultations and litigation. The USTR, as public authority acting on behalf of U.S. commercial interests, deploys these successive deadlines to steadily ratchet up pressure on foreign governments.

The USTR gathers information from public and private sources and attempts to rank trade matters in terms of their relative importance.125 The Super 301/National Trade Estimates reports identify trade barriers on a country-by-country basis, estimating “the impact of these foreign practices on the value of U.S. imports,”126 thereby prioritizing country practices. The Special 301 reports likewise categorize countries as priority foreign countries, those on the “priority watch list” and those on the “watch list,” setting the basis for a U.S. complaint in each case. The reports have tended to become more detailed over time.127 Where USTR officials are overburdened, which is

124 As Richard Cunningham of the Washington DC law firm Steptoe & Johnson, notes, this list is not exclusive. Firms can also, for example, lobby the International Trade Commission to conduct a study of foreign barriers, as in a specific sector, in order to help establish facts and political momentum for a U.S. case. Interview in Washington DC (Oct. 18, 2001).

125 In addition, the USTR issues annual reports on government procurement practices (under Title VII of the Omnibus Trade and Competitiveness Act of 1988) and barriers in the telecommunications sector (under Section 1377 of such 1988 act). See e.g. Gary Yerkey, Telecommunications: U.S. Threatens Trade Action Against Mexico, Colombia, South Africa and Taiwan, 18 INT’L TRADE REP (BNA) 528 (April 5, 2001) (in response to U.S. carrier complaints under Section 1377 of the Omnibus Trade and Competitiveness Act of 1988 requiring an annual review). Its report on foreign government procurement practices was initially required under Title VII of the Omnibus Trade and Competitiveness Act of 1988 and was reinstated, simultaneously with Super 301, by Executive Order in 1999. In the 1999 government procurement report, the USTR also announced that it would seek formation of a WTO dispute settlement panel for a claim against South Korean discriminatory practices in the bidding for the construction of the U.S. $6 billion Inchon International Airport project. See USTR Seeks WTO Dispute Panel, supra note ____.


often the case, the U.S. governmental reports simply restate the formulations submitted to the USTR by private industry.

A report’s publication represents a “plateau in an ongoing dialogue” with foreign authorities. The USTR even provides “draft” reports to foreign officials in a last ditch effort to persuade them to change a regulatory policy or practice. If pre-publication negotiations are unsuccessful, the practice will be listed, forming the basis for initiating a WTO complaint. For example, following earlier warnings to the EC, Canada and Argentina, the USTR announced, upon issuance of its 1999 Special 301 Report, that it was filing WTO complaints against them for violating obligations under the TRIPs Agreement. The USTR negotiated in a similar fashion with concerned foreign countries before it published its 1999 Super 301 report, which triggered complaints against the EC, India and South Korea.

Report Sags, 20 Inside U.S. Trade 4 (Jan. 11, 2002) (“One factor in some associations’ decision not to submit comments was a new request from USTR that parties include the numerical estimates of the impact of trade measures.”) Another factor is that the Bush administration has appeared less ready to use WTO litigation, at least at the beginning of its tenure. Id.

128 Interview with former USTR member (May 14, 1999). The publication date for the Special 301 and NTE reports is currently April 30th of each year, setting a deadline which focuses negotiations. As a USTR official confirms, “What is valuable is the deadline. It does not matter what the date is.” Id.

129 See USTR Initiates WTO Consultations on IPR with Argentina, Canada, EU, 16 Int’l Trade Rep. (BNA) 763 (May 5, 1999). The TRIPs violations were all identified to the USTR by the pharmaceutical manufacturers’ trade association, PhRMA, in its annual Special 301 submission. On September 18, 2000, the Appellate Body upheld a panel decision that declared Canada’s Patent Act inconsistent with TRIPS for it provided only 17 years of patent protection. See Peter Menyasz and Daniel Pruzin, WTO Appellate Body Upholds United States in Complaint Against Canadian Patent Rules, 17 Int’l Trade Rep. (BNA) 1450 (Sep. 21, 2000). Consultations between the U.S. and Argentina on April 2, 2001, however, ended inconclusively and no decision has been made to hold future talks regarding Argentina’s patent legislation. See Daniel Pruzin, U.S. and Argentina Hold WTO Talks on TRIPS Complaint on Patent Rules, 18 Int’l Trade Rep. (BNA) 548 (April 3, 2001). [This latter stalemate appears to be another indication of a less aggressive approach toward developing countries regarding pharmaceutical patents, at least for the short-term. See supra note...]

130 Upon publication of the report, USTR announced new WTO cases against the EC (for French subsidies), India (for local content automobile requirements), and South Korea (for discriminatory restrictions on foreign beef). See USTR to Launch Three WTO Cases in Connection with Super 301 Report, 16 Int’l Trade Rep. (BNA) 762 (May 5, 1999). On July 31, 2000, a panel ruled against South Korea’s restrictive policies on beef. See Daniel Pruzin, WTO publishes Dispute Panel Ruling Upholding U.S. in Korea Beef Dispute, 17 Int’l Trade Rep. (BNA) 1241 (Aug. 10, 2000). On April 24, 2001 the U.S. and South Korea set a deadline of September 10, 2001 to implement the panel decision. See Daniel Pruzin, U.S., Australia Agree with South Korea on Deadline to Implement WTO Beef Ruling, 18 Int’l Trade Rep. (BNA) 661 (April 26, 2001). The trade dispute with India may be moot on account of India’s new export-import policy which does not contain local content or export balancing requirements. See Ravi Kanth, U.S., EU Auto Dispute with India May Be Moot Under India’s New Policy, 18 Int’l Trade Rep. (BNA)
U.S. trade associations, working in coordination with USTR, attempt to strategically use the process. According to a representative of the intellectual property industry, foreign countries now respond to trade association submissions with their own submissions, defending the legality of their practices and explaining why they should not be branded as priority countries.\textsuperscript{131} Such reactions demonstrates that foreign governments, particularly developing country governments, take the process seriously. Firms attempt to use this fight over the facts as leverage to have USTR press foreign governments to change the facts—that is, in intellectual property cases, to recognize and enforce U.S. patents and copyrights.\textsuperscript{132} The U.S. intellectual property industry claims that Special 301 has been a huge success, with countries around the world having adopted and strengthened intellectual property regimes.\textsuperscript{133}

USTR avoids commencing a formal Section 301 investigation on behalf of a private industry unless, at the end of the process, the United States is ready to retaliate or has another exit strategy.\textsuperscript{134}

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\item IIPA Interview, May 1999, supra note__.
\item What matters to firms is to use whatever levers they have available to change the facts on the ground. Even in the Kodak-Fuji case, Kodak’s attorneys claimed partial victory when Japan stated in its submissions to the WTO dispute settlement panels how it would enforce its antitrust laws. See Alan Wm. Wolff, \textit{951 Reflections on WTO Dispute Settlements}, 32 \textit{Int’l Law}. 951 (1998).
\item In the words of an intellectual property lobbyist, “Special 301 is a wonderful mechanism.” IIPA Interview, supra note __, See also, Testimony June 24, 1994, Harvey E. Bale, Senior Vice President, Pharmaceutical Research and Manufacturers of America, Senate Finance/International Trade Law “301” Designations (FDCH Congressional Testimony) (maintaining that “Section and Special 301 have earned a special degree of importance because they have served to drive progress” and citing “the most noteworthy successes of Special 301-related trade negotiations, including those with the Andean Pact, China, Hungary, Indonesia, the Philippines, Taiwan and Thailand”) [hereinafter PhRMA June 1994 Congressional Testimony]. Cf. the assessment of Patrick Low, a leading trade economist and advocate of multilateralism, now director of the Office of the Director General at the WTO, that “Special 301 has not been a success.” Patrick Low, \textit{Trading Free: The GATT and U.S. Trade Policy} 93 (1993). Low’s conclusion is cited with approval by another leading trade economist, Anne Kreuger, in her book \textit{American Trade Policy: A Tragedy in the Making} 68 (1995). However, these economists’ statements are contradicted by those working the Section 301 process. U.S. intellectual property firms brought numerous Special 301 cases during the early 1990s as part of a larger strategy to integrate intellectual property rules into the GATT (now WTO) system. See Susan Sell, \textit{Power and Ideas: North-South Politics of Intellectual Property and Antitrust} (1998). Sell points out, however, that the success of these legal changes ultimately will depend on enforcement in developing countries, \textit{id.} at 188.
\item 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
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As a former Section 301 committee member states, “Considerable air time” is given to the issue of “exit.”\textsuperscript{135} USTR wants to be sure that, if the foreign government refuses to make adequate concessions, the USTR has a preconceived plan. This was particularly important prior to the WTO’s creation because unilateral U.S. retaliation could trigger counter-retaliation, infuriating other U.S. commercial constituencies. With the advent of the WTO legalized dispute settlement system, the most common exit strategy from unsuccessful bilateral negotiation is filing a WTO claim, which triggers a new series of deadlines. When the USTR initiates a Section 301 investigation,\textsuperscript{136} it signals to a foreign country that the U.S. will file a WTO complaint or take some other action (within the constraints of WTO rules) if a settlement is not reached by a fixed date.

A U.S. threat of invoking WTO litigation itself can elicit concessionary settlements in the shadow of WTO law.\textsuperscript{137} The United States sometimes brings matters before the relevant WTO committees responsible for overseeing the WTO Agreements’ implementation, and settlements are negotiated without initiating a WTO complaint. For example, the USTR announced that, in 2000, “U.S. pressure on Hungary regarding restrictive import policies for beef products resulted in Hungary’s decision to open a special quota for high-quality North American beef,” and that U.S. certain limited circumstances (Section 305(a)).

\textsuperscript{135} Interview with a former Section 301 committee member (May 14, 1999).

\textsuperscript{136} 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.

\textsuperscript{137} See, e.g., Richard Cunningham, \textit{Trade Law and Trade Policy: The Advocate’s Perspective}, in CONSTITUENT INTERESTS IN U.S. TRADE POLICIES 263, 281-282 (Alan Deardorff & Robert Stern eds., 1998) (noting the many “significant success stories in U.S. companies’ use of Section 301,” or threatened use, to open up foreign markets, including for the U.S. aluminum industry, U.S. telecommunications equipment manufacturers, Boeing in respect of Airbus subsidies, and numerous examples in the area of intellectual property protection). \textit{See also} Seung Wha Chang, \textit{Taming Unilateralism under the Multilateral Trading System: Unfinished Job in the WTO Panel Ruling on U.S. Sections 301-310 of the Trade Act of 1974, 31 LAW & POL’Y INT’L BUS. 1151, 1157 (Summer 2000)} (“Experience has shown that the power of Section 301 lies in the threat of a trade sanction, rather than sanction itself. In fact, in only fifteen of the 119 Section 301 investigations made and disposed before August 9, 1999, were trade sanctions actually imposed” (citing Office of the United States Trade Representative, Section 301 Table of Cases (last modified Aug, 9, 1999) <http://www.ustr.gov/reports/301report/act301.htm>).
pressure on Korea resulted in a favorable modification of its administration of rice quotas. Where the United States formally initiates a complaint before the WTO Dispute Settlement Body, over half of these disputes are settled through concessions granted at the consultation stage. In 2000, for example, the United States initiated a complaint against Mexico under the WTO telecommunications agreement, known as the Basic Telecom Agreement, but suspended the case in 2001 after Mexico’s formerly government-owned firm, Telmex, agreed to significantly reduce its interconnection rates, opening the Mexican long distance telephone market to greater competition from U.S. firms.

Although Section 301 grants private firms legal rights to cause USTR to act on their behalf, the process in fact compels the USTR and private firms to act as partners in a public-private network if they wish to successfully exploit it. In the end, a firm depends on the USTR to defend its interests in intergovernmental negotiations or litigation, and the USTR hopes to successfully remove the foreign barrier in the most effective manner in order to prop its own standing within government. Firms thus rarely file a Section 301 petition against the USTR’s advice. A sophisticated firm approaches the USTR before submitting its petition. The USTR reviews and comments on draft petitions before recommending that one be filed. If the USTR believes that the Section 301 process

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138 USTR, 2001 TRADE POLICY AGENDA AND 2000 ANNUAL REPORT 40 (2001) (referring to U.S. interventions in meetings of the WTO Committee on Agriculture). Similarly, before the WTO Committee on Balance of Payment Restrictions, the Slovak Republic, Rumania, Pakistan and Bangladesh all announced reductions or phase outs of import controls on balance-of-payments grounds, id., at 84.


140 In 2000, the United States initiated a complaint against Mexico under the WTO telecommunications agreement, known as the Basic Telecom Agreement, but suspended it after Telmex agreed to significantly reduce its interconnection rates. Interview with USTR official in Washington (October 18, 2001). See also, John Nagel, Telmex, Rivals Finalize Connections Accord, Ending Years of Dispute, Easing WTO Battle 18 INT’L TRADE REP. (BNA) 6 (January 4, 2001); and Rossella Brevetti, US Sees Possible Resolution to Telecom Issues with Mexico 18 INT’L TRADE REP. (BNA) 901 (June 7, 2001). However, the United States subsequently renewed its complaint against Mexico despite Mexican concessions. See Daniel Pruzin, Mexico Hits out at U.S. for Pursuing WTO Claim on Mexican Telecom Market, 19 INT’L TRADE REP (BNA) 460 (March 14, 2002).

141 Williamson interview, supra note__.
is not the most effective means to have the barrier removed, it will so indicate. For this reason, the USTR has rarely had to formally reject a third party petition in Section 301's twenty-eight year history.142

6. Litigating before the World Trade Organization. If the USTR, in consultation with industry, decides to file a complaint before the WTO Dispute Settlement Body, the exchange of information and general coordination between public trade officials and the affected industry intensifies. Demand for public-private collaboration has heightened since the WTO’s formation in 1995 because, under the former GATT regime, intergovernmental diplomacy played a greater role vis-a-vis legal rules. Given the number of complicated cases that USTR counsel now must litigate, the need for sophisticated factual development and legal argument, the tight deadlines imposed by the WTO’s Dispute Settlement Understanding, and the political stakes of winning or losing WTO cases, USTR often requires industry to submit convincing factual and legal memoranda as a prerequisite to its filing of a WTO complaint.143 In the Korea-Alcohol case, for example, the USTR asked industry representatives to take pictures of bars, check web sites and advertisements and prepare a detailed market analysis for the USTR before it filed the suit.144

142 The last time that the USTR formally rejected a Section 301 petition was over ten years ago, when, in 1988, it rejected a petition filed by the Governor of Michigan concerning Canadian restrictions on the import of automobile components, and another filed by U.S. rice millers' associations concerning Japan’s import restrictions on rice. The USTR rejected the Michigan governor’s petition on the grounds that government officials are not authorized to file petitions under Section 302 and that the U.S.-Canada Free Trade Agreement was in the process of being implemented. The USTR rejected the petition filed by the Rice Council for Market Development and the Rice Millers’ Association on the grounds that the USTR had rarely had to formally reject a third party petition in Section 301's twenty-eight year history. See USTR Rejects Michigan Governor’s Complaint Against Canada’s Auto Duty-Remission Plan. 5 INT’L TRADE REP. (BNA) 1535 (Nov. 23, 1988). See Petition by Rice Council for Market Development and Rice Millers’ Association for Action Under Section 301; Decision Not to Initiate and Investigation; Reasons Therefor, 53 F.D.R. 44, 970 (Nov. 7, 1988); and Yeutter Rejects Rice Industry 301 Petition, Says GATT is a Better Forum for Complaint. 5 INT’L TRADE REP. (BNA) 1442 (Nov. 2, 1988).

143 As encapsulated in the remarks of one USTR lawyer, “we at USTR rely on industry.” Interview with USTR lawyer (May 19, 1999). See also Bello, Some Practical Observations, supra note __ (noting that the “administration’s lawyers... rely upon and work closely with the directly affected private parties. The input provided by the latter serves as additional resources and thereby reduces the burden on an administration in WTO litigation.”)

144 Interviews with USTR representative and representative of distilled spirits association (May 19, 1999). Similarly, in the Japan-Alcohol case, EC trade officials required industry to prepare detailed memoranda supporting the case before they were willing to take it to the WTO. Interview with USTR official (May 19, 1999) and a member of the Legal Services division of the European Commission (June 22 1999) (noting how the trade association
Private industry’s role in WTO disputes has grown as WTO cases have become more factually and legally complex. The EC bananas case, for example, involved over a dozen claims under four WTO agreements. 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.” In a case challenging Argentina’s customs treatment of U.S. textiles, USTR provided data on the customs treatment of 118 separate tariff categories. As WTO panels increasingly employ a highly contextualized, case-specific approach, as opposed to an application of generic rules, the demands on WTO complainants and defendants in presenting and explicating the facts accumulate. Although the USTR still seeks assistance from U.S. embassies, who may prepare helpful studies, private industry representatives are fundamental for the establishment of the factual record. U.S. attorneys involved in the bananas case, for example, maintain that a mark of the United States’ success is that the factual description in the WTO panel report was largely taken from the U.S. brief. Much of

provided statistics, pictures of bars, advertisements).

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

146 See Wolff, supra note ____, at 956.


149 Interview with USTR official (May 19, 1999). Confirmed in interview with a former member of the Legal Services division of the European Commission (June 22, 1999).
that U.S. factual description had, in turn, been prepared by Chiquita and its lawyers.150

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 Carolyn Gleason of McDermott Will & Emery, as did the American Meat Institute in EC-Meat Hormones. Kodak hired Alan Wolff of Dewey Ballantine in Japan-Photographic Film. In many cases, private counsel has entirely written 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.151

Defendant countries also increasingly hire private lawyers, including former USTR officials to defend them against U.S. claims.152 Defendants’ growing legal sophistication heightens the need for cooperation between USTR and the relevant U.S. industry. Private lawyers may now represent and plead, on behalf of states, before WTO dispute settlement panels153 and the WTO Appellate

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150 Interview with USTR official (May 19, 1999).

151 Of course, USTR does not necessarily take all or even part of what outside private counsel offers, but USTR often makes use of outside counsel’s offerings whether because USTR finds the briefs quite helpful, because USTR is overwhelmed, or because of political pressure from Congress. Interviews with former and current representatives of USTR. Interviews with USTR officials in Washington, Aug. 19, 2001 and Oct. 18, 2001. Sometimes lower level USTR legal counsel receive mixed messages, being told to “stop doing it yourself and start farming out to private firms,” on the one hand, and then that they “should take responsibility for drafting everything,” on the other.

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153 The Washington DC firm Powell, Goldstein, Frazier and Murphy often represents developing country interests, and has almost thirty attorneys working for it on WTO matters. In 2000, the firm hired one of USTR’s most seasoned veterans, Amelia Porges, author of Guide to GATT Law and Practice (Analytical Index): final edition updated to 1995, WTO Secretariat, 1995 (a 1,220 page, two volume edition with detailed subject index). In June 2000, the firm opened a branch in Geneva, which was led by Scott Anderson, who had worked for five years for USTR on WTO cases, much of the time based in Geneva. See Une firme d’avocats americaine ouver ses bureaux a Geneve pres de l’Organisation mondiale du commerce, LE TEMPS 33 (June 7, 2000).

Body. In the Korea-Alcohol case, for example, Korea hired a Brussels-based attorney, Marco Bronckers, to defend its interests. According to U.S. industry representatives, Bronckers “threw all sorts of garbage at us” in an attempt to demonstrate that Korea’s tax system, which taxed whisky “at ten times the rate” of the rice-based soju, was nondiscriminatory because (in GATT terms) soju was not a competitive or “like product.” That is, Korea’s attorney presented factual evidence designed to show that soju and U.S. distilled spirits were not competing products because they were for different markets. In responding to Korea’s proposed definition of the relevant Korean product market, the USTR required extensive assistance from the U.S. distilled spirits trade association (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.

D. The Impact of the World Trade Organization on Section 301. Some commentators argue that the WTO’s formation has curtailed the use of Section 301. This assertion is true in the sense that the United States now brings most claims directly to the WTO, without first initiating a formal Section 301 investigation. However, the claim is overstated in that it is based on a view of Section 301 simply as a unilateralist formal U.S. legal procedure, as opposed to a process of public-private collaboration to gather facts and steadily ratchet up pressure on foreign governments in the shadow

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155 Interview with DISCUS representative (May 19, 1999).

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

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

158 See Joel Trachtman, Whose Right is it Anyway? Private Parties in EC-U.S. Settlement at the WTO (draft manuscript, April 5, 2002) 27-28 (noting the reduced number of WTO cases initiated by the USTR that did not first entail a formal Section 301 investigation).
of international law. 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.\textsuperscript{159} Even as a formal procedure, from 1995-1998, the USTR initiated twenty-four Section 301 investigations, exceeding the annual average over Section 301's prior history.\textsuperscript{160} Although the number of formal Section 301 cases has dropped since January 1999,\textsuperscript{161} the United States often has initiated WTO claims at the time of publicizing its Section 301 and Special 301 annual reports.\textsuperscript{162} In these cases, while there has been no formal investigation under Section 301 of the 1974 Trade Act, the USTR has investigated informally whether the United States has a strong legal claim before publishing the trade barrier in the annual report and launching the WTO claim. In addition, the United States now uses Section 301 to determine, in collaboration with private industry, the amount and type of sanctions to apply where a WTO member fails to comply with an adopted WTO panel decision, as in the meat hormones and bananas cases against the EC.\textsuperscript{163}

Overall, countries’ acceptance of a more legalized WTO dispute settlement system has 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 relatively less concerned about determining an exit option in cases involving a WTO violation, since the USTR can file a WTO complaint.\textsuperscript{164} If successful, and the foreign country complies with the panel decision, the process concludes. If the foreign country refuses to comply with the panel decision, the United States may

\begin{itemize}
  \item[\textsuperscript{159}] Williamson Interview, \textit{supra} note___.
  \item[\textsuperscript{160}] Prior to 1995 there were 96 “301” actions initiated over a twenty year period. \textit{See} Section 301 Table of Cases (Visited Oct. 25, 2001) <http://www.ustr.gov/enforcement/tradefaw.shtml >.
  \item[\textsuperscript{161}] The August 1999 table of cases reports only one additional 301 action in 1999. \textit{See} Section 301 Table of Cases (visited Oct. 25, 2001). \textit{See also} USTR, \textit{301 Alert} (last visited Dec. 11, 2001) <http://www.ita.doc.gov/td/industry/otea/301alert/retallist.html> (containing current list of Section 301 cases).
  \item[\textsuperscript{162}] \textit{See supra} note...
  \item[\textsuperscript{163}] Interview with USTR official ( Oct. 18, 2001) (noting work with private consultants hired by industry).
  \item[\textsuperscript{164}] Nonetheless, there remains some cases that have been too politically sensitive to bring before the WTO. \textit{See supra} note... (re the EC’s challenge to Helms Burton) and Mark Pollack and Gregory Shaffer, \textit{The Challenge of Reconciling Regulatory Differences: Food Safety and GMOs in the Transatlantic Relationship}, in \textit{TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY} 156, 167-172 (2001) (assessing why the United States has not brought a WTO case against the EU in respect of its regulations concerning genetically modified seeds and foods). 
\end{itemize}
retaliate without the prospect of counter-retaliation.\textsuperscript{165}

On the other hand, the WTO system has constrained the use of Section 301 investigations in a large category of cases. In response to the EC’s challenge to Section 301’s legality, a WTO panel held that, although provisions of the Section 301 statute constitute a “prima facie” violation of WTO obligations, the statute would be upheld so long as the United States government abided by its undertakings not to take unilateral action before exhausting WTO procedures.\textsuperscript{166} Even while upholding the statute’s legality, the panel placed the United States on notice of the WTO’s constraints on the statute’s use.

The WTO’s constraint on U.S. unilateral trade measures nonetheless is more limited than some commentators recognize.\textsuperscript{167} From a practical perspective, the United States still may take many forms of unilateral action against WTO members and not trigger WTO sanctions, since the United States can often exercise leverage in arguable compliance with WTO rules, especially vis-a-vis

\textsuperscript{165} However, a foreign country may bring a WTO complaint against the United States in retaliation to a U.S. complaint, as the EC arguably did in its complaint against U.S. tax subsidies (via “foreign sales corporations”) following the U.S. complaints against the EC’s banana licensing regime and the EC’s ban on hormone-treated beef. See infra note...

\textsuperscript{166} The WTO panel held that Section 301 in itself does not violate WTO law, but based its findings on “the US Administration’s undertakings” not to take unilateral action before exhausting WTO procedures. The panel noted, however, that “should [the undertakings] be repudiated or in any other way removed by the US Administration or another branch of the US Government, the findings of conformity contained in these conclusions would no longer be warranted.” See Report of the Panel, \textit{United States- Sections 301-310 of the Trade Act of 1974}, WT/DS152/R, (Dec. 22, 1999) at 351. For an overview and analysis of this case, see Seung Wha Chang, \textit{Taming Unilateralism under the Multilateral Trading System: Unfinished Job in the WTO Panel Ruling on U.S. Sections 301-310 of the Trade Act of 1974}, 31 \textit{LAW & POL’Y INT’L BUS.} 1151, 1157 (Summer 2000).

\textsuperscript{167} The constraint on the United States’ unilateral use of Section 301 in this category of cases occurred in 1995, the year of the WTO’s formation, with the dispute over Japan’s aftermarket for the replacement of automotive parts. The USTR had self-initiated a Section 301 complaint in 1994 concerning alleged Japanese restrictive practices in this sector and announced sanctions worth $5.9 billion dollars if Japan did not agree to change its practices and commit to binding purchases of U.S. auto parts. Japan challenged the USTR’s threat of unilateral sanctions before the WTO’s Dispute Settlement Body. So constrained, the United States negotiated an agreement with non-binding numerical targets which was widely interpreted as a capitulation. See \textit{U.S. Threatens Duties on Luxury Cars Worth $5.9 Billion in Japan 301 Dispute}, 12 \textit{INT’L TRADE REP.} (BNA) 849 (May 17, 1995). For an overview of the case, see Tracy Abels, \textit{The World Trade Organization’s First Test: The United States-Japan Auto Dispute}, 44 \textit{UCLA L. REV.}, 468 (1996).

The constraint of WTO rules on U.S. unilateral action against Japan was reconfirmed in Kodak’s Section 301 case filed in 1995. When Japan refused to yield to U.S. pressure to liberalize its film sector and agree to facilitate an increase in Kodak’s market share, the USTR was forced to take the case to the World Trade Organization, where it lost a panel decision in 1998. See WTO Panel Report, \textit{Japan--Measures Affecting Consumer Photographic Film and Paper}, WT/DS44/R (Mar. 31, 1998).
developing countries. As the trade lawyer Richard Cunningham notes, the United States could threaten “suspension or denial of various U.S. Government patents, [regulatory] approvals (FDA, for example), [and] licenses (e.g., FCC).”\(^{168}\) Similarly, an “offending country’s eligibility for U.S. benefits–foreign aid, Export-Import Bank financing, Overseas Private Investment Corporation or duty-free treatment under the Generalized System of Preferences–could also be withdrawn or limited.”\(^{169}\) Washington trade lawyers readily devise and recommend such measures on behalf of their U.S. clients.

Intellectual property firms, in particular, have used the Special 301 process and the annual renewal process of the U.S. General System of Preferences program to lobby the USTR to remove special tariff preferences granted to developing countries.\(^{170}\) They have not hesitated to lobby for other forms of pressure as well. In the Argentinian pharmaceutical case, for example, members of the U.S. intellectual property industry suggested that the U.S. Food and Drug Administration ban the importation of Argentinian beef on the grounds that it is not free of foot and mouth disease. They thereby hoped to coerce Argentina to change its patent law before being obligated to do so under the


\(^{169}\) Id.

\(^{170}\) The copyright trade association’s representative maintains that threats to remove GSP benefits have been “significant and effective, particularly against small countries.” IIPA Interview, *supra* note.... The Generalized System of Preferences (“GSP”) provides for reduced tariff rates for developing countries. For an overview of the GSP system, see Bhala and Kennedy, *supra* note ____, at 444-469. When the GSP program was renewed in 1984, Congress incorporated new requirements for the protection of U.S. intellectual property as a condition for the granting of GSP benefits. See Susan Sell, *Power and Ideas: North-South Politics of Intellectual Property and Antitrust* 135 (1998). As an example of industry pressure on least developed countries, see Rosella Brevetti, *Interagency Committee Weighs Industry Complaints Against Six Countries*, 17 Int’l Trade Rep. (BNA) 780 (May 18, 200) (noting industry complaints, in the context of reviews under the GSP program, that Armenia, the Dominican Republic, Ukraine, Kazakhstan, Uzbekistan and Moldova are not adequately protecting intellectual property rights.... At the hearing [of a US interagency committee], Dominican Republic Ambassador pledged to work with U.S. industry stakeholders, including IIPA, to ensure that intellectual property rights are protected and enforced.”) As another example, U.S. drug companies, who asserted that “Argentina’s refusal to enforce patents is costing them $540 million a year in lost sales,” successfully prompted the USTR to withdraw 50 percent of Argentina’s GSP benefits worth $260 million. See John Maggs, *US is Set to Penalize Argentina for Piracy*, J. Com., Jan. 6, 1997, at 1A. See also, John R. Schmertz & Mike Meier, *U.S. Imposes Trade Sanctions on Argentina for Failure to Protect U.S. Intellectual Property Rights*, 3 Int’l L. Update 34 (1997). As Alan Sykes reports in his 1992 study of Section 301, Section 301 success was “more likely with a GSP beneficiary.” See Sykes, *Constructive Unilateral Threats, supra* note ____, at 313. This is probably in large part because developing countries are more subject to U.S. coercion in light of the asymmetrical importance of the U.S. market.
TRIPs Agreement’s transition rules. As one industry representative noted, “This would have gotten Argentina where it hurts.”

Between January 1995 and October 15, 2001, USTR initiated eleven Section 301 investigations concerning “unreasonable practices” that do not violate WTO obligations, and settled seven of these allegedly to its satisfaction. In March 2001, USTR initiated a new Section 301 investigation of the intellectual property laws and practices of the Ukraine, found that the Ukraine’s policies were “unreasonable,” and then suspended its GSP benefits and announced additional trade sanctions valued at US$75 million per year.

Overall, although a legalized WTO system has somewhat constrained unilateral exercise of U.S. market power, it has simultaneously triggered exploitation by the United States of its comparative advantage in public and private lawyering. The constraints on unilateral U.S. political pressure in a category of cases is offset by the expanding scope of obligations covered by WTO rules, such as 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

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171 Interview with pharmaceutical trade lobbyist (May 20, 1999).

172 On the definition of “unreasonable practices” in Section 301, see supra note...


175 A former USTR official and now practicing trade lawyer at Hogan & Hartson confirms that “TRIPs, GATS, standards and telecoms have generated a huge amount of work” for the Washington trade bar. Interview, May 19, 1999.
The five primary Section 301 patent and copyright claims were 1) Portugal’s Practices Regarding Term of Patent Protection. (301-103) self-initiated by the USTR on April 30, 1996; 2) India’s Practices Regarding Patent Protection for Pharmaceuticals and Agricultural Chemicals (301-106) self-initiated by the USTR on April 30, 1996; 3) Pakistan’s Practices Regarding Patent Protection for Pharmaceuticals and Agricultural Chemicals (301-104) self-initiated by the USTR on April 30, 1996; 4) Honduran Protection of Intellectual Property Rights (301-116), self-initiated by the USTR on Oct. 31, 1997; and 5) Intellectual Property Laws and Practices of the Government of Paraguay (301-117), self-initiated by the USTR on Feb. 17, 1998. The sixth case, Indonesian Practices Re: Promotion of Motor Vehicle Sector (301-109), self-initiated by the USTR on Oct. 8, 1996, also involved an intellectual property claim under article 64 of the TRIPS Agreement, but this claim was peripheral to the matter and did not succeed in the subsequent WTO case. In addition, there were a number of IP-related cases, such as Turkey’s Practices Regarding the Imposition of a Discriminatory Tax on Box Office Revenues (301-105), filed June 12, 1996, and Canadian Communications Practices (301-98), filed by Country Music Television on Dec. 23, 1994 with the USTR initiating an investigation on Feb. 6, 1995, and Canadian Practices Affecting Periodicals (301-103), self-initiated by the USTR on April 30, 1996.

The United States brought three WTO intellectual property-related claims in 1999 and two more in 2000, bringing to fourteen the number of such WTO complaints filed by the United States since the WTO’s formation. Although only two complaints have involved services, the number of services claims could grow in the future. With these and other claims, USTR may decide, on a case-by-case basis, whether to strategically use a formal Section 301 investigation to ratchet up pressure before filing a WTO complaint, or whether to immediately file a WTO complaint. Even if the law known as “Section 301” is replaced, the process of public-private fact-gathering, prioritizing and strategizing

176 The five primary Section 301 patent and copyright claims were 1) Portugal’s Practices Regarding Term of Patent Protection. (301-103) self-initiated by the USTR on April 30, 1996; 2) India’s Practices Regarding Patent Protection for Pharmaceuticals and Agricultural Chemicals (301-106) self-initiated by the USTR on April 30, 1996; 3) Pakistan’s Practices Regarding Patent Protection for Pharmaceuticals and Agricultural Chemicals (301-104) self-initiated by the USTR on April 30, 1996; 4) Honduran Protection of Intellectual Property Rights (301-116), self-initiated by the USTR on Oct. 31, 1997; and 5) Intellectual Property Laws and Practices of the Government of Paraguay (301-117), self-initiated by the USTR on Feb. 17, 1998. The sixth case, Indonesian Practices Re: Promotion of Motor Vehicle Sector (301-109), self-initiated by the USTR on Oct. 8, 1996, also involved an intellectual property claim under article 64 of the TRIPS Agreement, but this claim was peripheral to the matter and did not succeed in the subsequent WTO case. In addition, there were a number of IP-related cases, such as Turkey’s Practices Regarding the Imposition of a Discriminatory Tax on Box Office Revenues (301-105), filed June 12, 1996, and Canadian Communications Practices (301-98), filed by Country Music Television on Dec. 23, 1994 with the USTR initiating an investigation on Feb. 6, 1995, and Canadian Practices Affecting Periodicals (301-103), self-initiated by the USTR on April 30, 1996.


178 Three services-related claims were filed in 1995, but each concerning the EC’s banana licensing regime, alleging violations of the GATS. On Aug. 17, 2000, the United States brought, for the first time, a telecommunications services complaint before the WTO dispute settlement body. The United States brought the complaint against Mexico following reviews of Mexico’s practices under Section 1377, the version of Section 301 for telecommunication obligations. See USTR, 2001 TRADE POLICY AGENDA AND 2000 ANNUAL REPORT, at 215-217 (2001).

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

E. The Complementary Power of Ideas: The Role of U.S. Public-Private Networks in “Educating” Foreign Governments. U.S. public-private partnerships employ carrots as well as sticks to influence foreign government policies. In the intellectual property field, the offered carrot is that a developing country, by recognizing and enforcing intellectual property rights, will attract foreign direct investment, foster technology-intensive domestic investment, and ultimately improve its economic performance and national welfare by more closely integrating itself into the global economy. The wielded stick is that a developing country will face aggressive U.S. legal claims—or possibly other measures—if it does not comply with its WTO obligations.

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

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180See e.g., PhRMA June 1994 Congressional Testimony, supra note, (maintaining that aggressive U.S. pressure on developing countries to enhance pharmaceutical protection, despite their protests, is “benefitting them economically as well, as in terms of quality of their healthcare”).

181See e.g., U.S. Threatens Argentina with Complaint under TRIPs Agreement, 16 INT’L TRADE REP. (BNA) 1712 (October 20, 1999) (recounting PhRMA’s urging of the USTR to take action, and the hardline stance that the USTR has taken); Firms Likely to Urge U.S., EU to File WTO Case Against Bulgaria over TRIPs, 14 INT’L TRADE REP. (BNA) 1749 (Oct. 15, 1997) (describing private firms’ lobbying effort against Bulgaria when it attempted to extend its transition period by being classified as a developing country, and reporting industry representatives’ insistence that immediate TRIPs implementation be a requirement for WTO accession).

182See Sell, The Globalization of Intellectual Property Rights, supra note, at 192. See also id. at 190. Sell, however, also notes that while U.S. private actors successfully pressured U.S. politicians to take up their cause and developing countries to agree to agree to new international regimes for intellectual property protection, developing countries “have resisted implementing and enforcing the new policies.” Susan Sell, Power and Ideas: North-South Politics of Intellectual Property and Antitrust 36 (1998).
“experts” to change perceptions of services as constituting “trade.” Gradually, this public-private network was able to break down developing country resistance to the incorporation of services into the international trade regime, which culminated in the WTO Agreement on Trade in Services (GATS).

Following conclusion of the WTO Agreements, U.S. industry has continued to work with U.S. public officials to “educate” foreign governments about not only legal requirements, but also the economic benefits of complying with WTO obligations. Industry, for example, has successfully lobbied the USTR and Congress to allocate funds for educational efforts abroad, often nominally sponsored by international organizations such as the WTO or, for intellectual property rights, the World Intellectual Property Organization (WIPO). The United States has regularly sent representatives from the U.S. pharmaceutical and copyright industries to Geneva as WIPO “faculty” to educate developing country representatives about intellectual property matters. U.S. public-private partnerships exploit ideas that support a firm’s and the United States’ material interests as complements to their more coercive legal challenges.


185 Interviews with members of IIPA and PhRMA (May 17 & May 20, 1999).

186 Most economists believe that the TRIPs Agreement should lead to a net flow of funds to the United States and other developed countries from developing countries. See, e.g. Keith Maskus, Intellectual Property Issues for the New Round, in The WTO After Seattle 137, 142 (Jeffrey Scott ed., 2000) (noting an estimate of “static risk transfers... of some $5.8 billion per year” to the United States, and “a net outward transfer of around $1.2 billion per year” for Brazil); and Alan Deardorff, Should Patent Protection Be Extended to All Developing Countries? 13 World Economy 497, 507 (1990) (“patent protection is almost certain to redistribute welfare away from developing countries”). For a study of the impact of the TRIPs Agreement on India, see, e.g., Jayashree Watal, Pharmaceutical Patents, Prices and Welfare Losses: Policy Options for India Under the WTO TRIPS Agreement, 23 World Economy 733 (2000) (noting “that prices are likely to increase and welfare likely to decrease” in India).
F. Limits to Private Interests’ Role in Public-Private Networks. Despite the relative success of U.S. public-private networks in WTO litigation and settlement negotiations, there remain important limits to U.S. public-private cooperation, leading to tensions between government officials and firm representatives and their lawyers. The core of this tension is that the USTR ultimately is to represent the national interest, not the firm’s interest. In particular, the USTR must consider that the United States may subsequently be on the defensive in a similar case. The USTR must be careful not to apply the relevant WTO agreements in a manner that could subsequently be used against the United States. Thus, when USTR collaborates with a firm’s outside legal counsel, they may engage in a battle of the briefs, with private counsel trying to insert statements binding U.S. policy and USTR stripping them out. For example, in defending the FSC tax case against the EC challenge, private counsel had two goals, one to win the case, the other to have the U.S. Treasury department bind itself to rule interpretations favorable to the private sector.

The USTR is particularly concerned about antidumping, countervailing duty and safeguards cases, given that the United States is the largest users of these import relief measures. An increasing number of WTO members are applying new antidumping and other import relief laws that can severely prejudice U.S. exporting firms. During the first five and half years of the WTO

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187 The USTR finds that some firms, and particularly their lawyers, can be overbearing, exacerbating such tensions. Interview with a former USTR lawyer (May 14, 1999).

188 Interview with USTR official, in Washington, Oct. 18, 2001 (noting that this pas-a-deux can be a “form of ballet”).


190 As of December 31, 1999, 87 WTO members (counting the EC as one member) announced that they had enacted antidumping legislation, 30 of which announced that this was new legislation. WTO ANNUAL REPORT 2000, at 47 (2000). The WTO’s Annual Report 2000 notes that “there were 523 initiations of antidumping investigations in 1998, 15% more than in the previous year.... During the period 1 January to 30 June 1999, there were 275 requests for initiation of anti-dumping investigations,” id. at 21. India and the EC each initiated more antidumping investigations in the first six months of 1999 than the United States (40 in India, 32 in the EC, and 28 in the United States). Id. at 47. Similarly, in 1998, the United States initiated only about 10% of new antidumping cases, having
(through June 2000), U.S. exports were subject to 81 antidumping investigations in 17 countries, resulting in 51 antidumping measures imposed.\textsuperscript{191} The United States, however, cannot take as strong of a stance to challenge these third country procedures as prejudiced industries would like, because the United States does not wish to undermine its own antidumping and import relief procedures. In fact, WTO members have filed more WTO claims against the United States’ antidumping laws and countervailing duty laws than those of all other WTO members. Since the WTO’s formation through September 2001, WTO members have filed eighteen complaints against the United States in respect of its antidumping and countervailing duty laws and six additional complaints against U.S. application of its import safeguards law. During the first nine months of 2001 alone, WTO members filed seven new requests for consultations and panel formations in respect of U.S. antidumping and countervailing duty laws and measures.\textsuperscript{192} These challenges to U.S. import relief laws have generated

\textsuperscript{191} See Brink Lindsey and Daniel Ikenson, \textit{Coming Home To Roost: Proliferating Antidumping Laws and the Growing Threats to U.S. Exports}, 14 TRADE POLICY ANALYSIS 1 (June 30, 2001) (visited Oct. 2, 2001) <http://www.freetrade.org/pubs/pas/tpa-014es.html> (published by Cato Institute, a conservative Washington think tank, noting that “the U.S. was the third most popular target of antidumping measures worldwide— trailing only China and Japan” during this period, and that the number of antidumping measures in force against the United States rose 41% during the period between 1996-2000 compared to 1990-1995).

\textsuperscript{192} In a three week period at the end of the summer of 2001, WTO panels were formed to hear challenges on four separate challenges against U.S. import protection laws and proceedings. On Sept. 10, 2001, WTO panels were established on the following matters: \textit{US-Countervailing Measures Concerning Products from the EC; US-Countervailing Duties on Certain Corrosion Resistant Carbon Steel from Germany; US-Definitive Safeguard Measures on Imports of Steel Wire Rod and Circular Welded Quality Line Pipe}. On Aug. 23, 2001, a WTO panel was established to examine complaints by Australia, Brazil, Chile, the EC, India, Indonesia, Japan, Korea, and Thailand in US-Continued Dumping and Subsidy Act of 2000 (Byrd Amendment). This latter panel will also examine Canada and Mexico’s complaint on the same matter. See, e.g. \textit{U.S. Peppered with WTO Complaints, Criticizes Prior Rulings}, 19 INSIDE U.S. TRADE 6 (Aug. 24, 2001) (noting five new WTO challenges, including against a U.S. law (known as the Byrd amendment) that provides for the distribution of “the proceeds from antidumping and countervailing duties to U.S. industry petitioners,” three EC challenges to U.S. import restraints on steel; and a Canadian challenge to a U.S. provision that “delays the refunding of antidumping and countervailing duties to be WTO illegal.” The article also notes how the United States’ “lashed out” against WTO rulings against it involving U.S. antidumping duties on Japanese hot-rolled steel and U.S. treatment of export restraints as countervailable—the latter because it adversely implicated U.S. domestic anti-subsidy suits against Canadian provincial bans on exports of raw logs). See also Jenna Greene, \textit{U.S. Trade Laws in Cross Hairs of WTO Member Nations}, LEGAL TIMES (Nov. 7, 2001) (noting that “ten nations plus the EU have launched a WTO challenge [against the Byrd amendment to U.S. antidumping and countervailing duty law]– more co-complainants than any other case
vehement protest in the U.S. Congress, raising Congressional skepticism about the benefits for the United States of a legalized WTO system. ¹⁹³

Thus, even when the United States challenges a foreign government’s import relief actions, it is much less aggressive than would be a prejudiced commercial firm. For example, the USTR took a less incisive stance in challenging a Mexican antidumping measure against the U.S. sugar industry in order to retain greater discretion for U.S. administration of its laws. ¹⁹⁴ Similarly, when a WTO panel held that an Australian firm must return a WTO-illegal subsidy to the Australian government, the United States reacted unfavorably, maintaining that the panel went further than the United States sought. The United States eventually settled the case outside of the dispute settlement system in a less favorable manner to the U.S. automotive leather industry.¹⁹⁵ As USTR General Counsel Peter Davidson confirms, “If we take a position out of convenience in one case, we have to be prepared to have it shoved back in our face next time.”¹⁹⁶

¹⁹³ See e.g. Congressional Record, May 23, 2002, page S4800 (Senator Rockefeller maintaining that “WTO tribunals have violated their mandate not to increase or reduce the rights and obligations of WTO members; have imposed their preferences and interpretations, and those of a biased WTO Secretariat, on the United States”); and Jenna Greene, *Grudge Match: Why the United States is on a Losing Streak at the WTO*, 24 Legal Times (Nov. 5, 2001) (noting letter signed by 63 senators “opposing any negotiations that could result in weaker U.S. trade laws”).


¹⁹⁵ See Daniel Pruzin, *U.S. Puts Off Retaliation Decision in Australian Car Leather Complaint*, 17 INT’L TRADE REP. (BNA) 469 (in a decision involving Australian subsidies for leather used in automobiles, a WTO panel ordered the subsidies to be reimbursed to the Australian government retroactively; the article notes how “even the United States expressed misgivings, declaring that it did not entirely agree with the decision and that the panel’s remedy ‘goes beyond that sought by the Untied States.’”). On June 21, 2000 the U.S. and Australia announced a settlement pursuant to which Australia’s Howe and Co. was to repay $7.2 million in government grants (out of a much larger total amount), and the Australian government would remove the eligibility of automotive leather from government support programs targeted for the textiles, clothing and footwear sector. The Australian government also agreed to prohibit any new direct or indirect subsidies for automotive leather manufacturers for a 12 year period. *See* Daniel Pruzin, *U.S. and Australia Tell WTO Details of Auto Leather Dispute Settlement*, 17 INT’L TRADE REP. (BNA) 1213 (Aug. 3, 2000). The Washington firm, Collier Shannon, that represented the automotive leather industry, itself likely had internal conflicts of interest, as one major partner, Paul Rosenthal, represented the steel industry which certainly did not “appreciate” an aggressive challenge to government relief from foreign competition. Interview with Washington insider (Oct. 18, 2001).

For other issues, such as intellectual property protection, one might think that U.S. industry and government positions always would align since the United States would always be a claimant. However, even in copyright cases, U.S. firms may want the USTR to take a tougher position. The United States, for example, was a defendant in a case brought by the EC challenging a provision of U.S. copyright law that exempts the restaurant and bar industry from paying royalties. While the U.S. copyright industry hoped that the U.S. government would lose the case, and even provided some assistance to the EC, the U.S. restaurant and bar industries and their allies in Congress who enacted the exemption demanded that the USTR vigorously defend it. Consequently, when bringing copyright claims against third countries under the TRIPs Agreement, the USTR will assess the implications of a claim for the United States’ own copyright laws before formulating its arguments.

In addition, U.S. domestic politics and countervailing U.S. commercial concerns shape U.S. litigation strategies. As mentioned earlier, the U.S. withdrew its threat of a WTO claim against South Africa in response to pressures from AIDS activists on Vice President Gore’s presidential campaign. Similarly, in June 2001, the Bush administration withdrew the United States’ claim against Brazil’s compulsory licensing provisions under Brazil’s patent law in the context of widespread protest against the U.S. action from advocacy groups and other international organizations, as well as ongoing protests against the U.S. and WTO claiming that they place

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198 See infra note ___ and accompanying text.

199 See supra note...

200 See, e.g., Daniel Pruzin and Gary. G. Yerkey United States Drops WTO Complaint against Brazil over HIV/AIDS Patent Law. INT’L TRADE REP. (BNA) 1002 (June 28, 2001). Doctors Without Borders declared that Brazil’s patent policy was key to the success of the Brazil’s strategy to offer universal access to HIV/AIDS medication in Brazil. Brazil’s health program includes free distribution of antiretroviral drugs produced in Brazil. This program has allegedly reduced AIDS deaths by 50 percent since it was introduced and saved the government an estimated $422 million in hospitalization and medical care costs. See Daniel Pruzin, US Responds to Criticisms of Brazilian Patent Law Complaint. INT’L TRADE REP. (BNA) 238 (February 8, 2001). Oxfam, a British NGO, backed Brazil’s efforts in a policy paper that maintained that the US complaint was an assault on public health. See Drug Companies vs. Brazil: The Threat to Public Health. (last visited August 21, 2001) <http://www.oxfam.org.uk/policy/papers/ctcbraz.htm>. Similarly, 52 countries of a 53 member United Nations
corporate interests before life-and-death medical concerns. While the U.S. pharmaceutical industry publicly supported the U.S. decision, it “feared that the U.S. decision to back down... would send a signal to developing countries all over the world that it could not withstand the political heat that comes with aggressively pursuing TRIPs violations, especially with respect to medicines.” The pharmaceutical industry’s fears were confirmed when USTR Robert Zoellick abandoned it with little consultation in agreeing to the “Doha declaration” regarding WTO enforcement of pharmaceutical patents. In light of the time-consuming transition of the Bush administration following the disarray of the November 2000 Presidential vote, the United States only initiated one new WTO complaint during the first nine months of 2001, and that was a complaint linked to an earlier dispute with the EC.

Finally, U.S. national security concerns still influence U.S. strategies in WTO litigation. Following the suicide commercial airliner attacks that leveled the twin towers of the World Trade Center and a section of the Pentagon, USTR Robert Zoellick suggested that the United States could

Commission endorsed Brazil’s AIDS policy and backed a resolution sponsored by Brazil that called on all states to promote access to AIDS drugs. See UN Rights Body Backs Brazil on AIDS Drugs (Last visited August 17, 2001) <http://www.news24.com/News24/Health/Aids_Focus/0,1113,2-14,659_1014970,00.html>.

See, e.g. U.S., Brazil End WTO Case on Patents, Split on Bilateral Process, 19 INSIDE U.S. TRADE 1, 2 (June 29, 2001) (“Informed sources said the U.S. backpedaling from the WTO panel, which it had requested in February, reflected an unwillingness on the part of U.S. Trade Representative Robert Zoellick to give opponents of trade liberalization a red-hot issue that appeared to give credence to the idea of the WTO interfering with poor countries’ health policies.”). See also, LORI WALLACH AND MICHELLE SFORZA, WHOSE TRADE ORGANIZATION? CORPORATE GLOBALIZATION AND THE EROSION OF DEMOCRACY (Public Citizen: 1999) (the Preface by Ralph Nader refers to “an autocratic system of international governance that favors corporate interests,” and concludes that “Under the WTO, the race to the bottom is not only in standard of living and environmental health safeguards but in democracy itself,” id. at ix, xi) (underlining included in text).

See, e.g. U.S., Brazil End WTO Case on Patents, Split on Bilateral Process, 19 INSIDE U.S. TRADE 1, 2 (June 29, 2001).

E-mail from Washington insider, June 27, 2002. See also Gary Yerkey and Daniel Pruzin, Agreement on TRIPs/Public Health Reached at WTO Ministerial in Doha, 18 Int’l Trade Rep. (BNA) 1817 (Nov. 15, 2001) (noting that “representatives with the pharmaceutical industry were less than enthusiastic,” and a Swiss officials, also representing pharmaceutical interests, “expressed fury at being excluded”).

In an action first brought by the EC in March 1999, the WTO Appellate Body ruled on December 22, 2000 that a U.S. safeguard measure for wheat gluten was inconsistent with its WTO obligations under the Safeguards Agreement. The EC announced that it would retaliate by imposing a surcharge on imports of U.S. corn gluten feed until the United States terminated its safeguard action. This triggered the United States to request WTO consultations over the EC action on January 25, 2001. See USTR, 2001 TRADE POLICY AGENDA AND 2000 ANNUAL REPORT, at 221 (2001).
be less aggressive in its stances vis-a-vis developing countries on trade issues where it needed those countries’ support in the U.S. fight against terrorist networks and the countries that harbor them. As Zoellick stated, “We need an economic strategy that complements our security strategy.”

The limits to collaboration demonstrate that U.S. trade litigation does not involve a clientele relationship, but rather ad hoc public-private partnerships where diverse interests coincide. Even when they collaborate in WTO trade litigation, public and private interests are not perfectly synchronous. As in most partnerships, there are tensions. Nonetheless, the current “intergovernmental” dispute system requires that U.S. public authorities and private industry work together as partners if they wish to advance their separate, but reciprocal interests.

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

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

EC public-private partnerships, however, operate quite differently than those in the United States. The EC’s more convoluted policy-making process slows the development of EC public-private collaborations on trade matters. Directly or indirectly, the Commission seeks approval of its trade policy initiatives by the EC’s fifteen member states, often by consensus. Individual member states may place breaks on the Commission’s discretion to take a more proactive role. In addition,

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206 In terms of Commission-private sector relations generally, see David Coen, *The Evolution of the Large Firm as a Political Actor in the European Union*, 4 J. EUR. PUB. POL’Y 104 (1997) (“the Commission will continue to develop its relationship with business to reinforce the Commission’s position in relation to nation states.”). Coen likewise concludes that “the Commission benefits from improved input into the national policy making process, the establishment of a wider constituency of pan-European firms, and greater policy-making legitimacy,” id.

207 As for the Commission’s enhanced prominence in external relations, Assistant Secretary of Commerce Franklin Vargo has noted that the New Transatlantic Agenda signed between the U.S. and EU in December 1995 “marks the first time that we are dealing with the EU as a political institution on a large scale.” *Issues in U.S.-European Union Trade: European Privacy Legislation and Biotechnology/Food Safety Policy Before the House Comm. on International Relations*, (1998) (testimony of Assistant Secretary of Commerce Franklin Vargo), Federal News Service (May 7, 1998). At the core of the NTA lies trade and other economic relations. For an overview of the history of U.S.-EU economic relations since WWII together with recent institutional developments in the transatlantic relationship, see Mark Pollack & Gregory Shaffer, *Transatlantic Governance in Historical and Theoretical Perspective*, in *TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY* 3-17 (2001).

208 As Greenwood notes in respect of the Commission generally, “Taken as a whole, the Commission has become dependent upon specialist input from outside interests. The European Commission is so small that there might be just one official with responsibility for the affairs of an entire business domain. It has therefore become dependent upon input from specialist outside interests, sometimes to the extent that European business interest groups write Commission reports.” See Justin Greenwood, *Organized Business and the European Union*, in *ORGANIZED BUSINESS AND THE NEW GLOBAL ORDER* 77, 80 (Justin Greenwood & Henry Jacek eds., 2000).
most EC firms remain predominantly nation-based. Though the situation is evolving, EC firms traditionally have had fewer direct contacts with the Commission in Brussels than U.S. firms with officials in Washington. Thus, contrary to the situation in Washington, the Commission has had to more proactively seek contact with private firms. Because of the Commission’s relatively greater independence and its dominant role in forging EC public-private collaborations, this section will focus more on the Commission’s strategies than did the previous one on the USTR’s. The following section will assess the reasons for these distinctions. Although these Commission-dominated public-private collaborations differ from those in the United States, they too have been quite successful in making use of the WTO system, in particular since 1997 when the Commission’s new “market access strategy” began to bear fruit. Although U.S. and EC political structures diverge, U.S. and EC trade litigation strategies have achieved similar results.

A. Background: The EC’s Shift from a Defensive to a Market Access Strategy. From the EC’s creation in 1957 through the WTO’s in 1995, EC trade policy was relatively defensive in posture, reacting to foreign imports and domestic demands for protection on the one hand, and to new trade liberalization proposals advanced by the United States, often to dismantle those EC barriers, on the other. The original proposal for establishing a liberal trade regime under the GATT was driven by the United States, not war-torn Europe. As documented by Kenneth Dam and others, the United States pressed for the development of a more liberal trade regime immediately following World War II based on negotiations of reciprocally reduced tariffs. U.S. leaders such as Secretary of State Cordell Hull maintained that such a regime was needed to avoid repetition of the protectionist policies of the 1930s that they believed contributed to economic retrenchment and nationalist tensions that, in turn, facilitated the rise of the Nazi party, leading to the century’s second world war. American leaders believed that liberal economic policies would help rejuvenate Europe

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209 See Dam, supra note ____; DESTLER, AMERICAN TRADE POLITICS, supra note _____, at 5-6. See also JUDITH GOLDSTEIN, IDEAS, INTERESTS, AND AMERICAN TRADE POLICY 137-163 (1993) ("the national mood created a policy window, allowing those critical of high-tariff policy [such as Cordell Hull and other free-traders] to restructure tariff-making institutions to facilitate tariff reform. The shock of the Great Depression then created an opportunity for political entrepreneurs...").
and thereby stem communist expansion from the Soviet east.\textsuperscript{210} The United States continued to play a leading role in the negotiation of seven rounds of multilateral trade negotiations, culminating in the completion of the Uruguay Round and the creation of the World Trade Organization. During the Uruguay Round negotiations, EC negotiators often were forced to respond to U.S. proposals as opposed to taking the initiative.\textsuperscript{211} Differences among member states, in particular concerning agricultural and textile policies that divided more liberal-oriented northern European states from more protectionist-oriented members from the south, resulted in delay and caution, anathema to productive initiatives.\textsuperscript{212}

Following the WTO’s establishment in January 1995, the United States was quick to employ the WTO’s more legalized dispute settlement system, while the EC was initially on the defensive. The United States, working in conjunction with private enterprises and trade associations, initiated a series of high profile cases against the EC, challenging long-standing, politically sensitive EC barriers to the importation of bananas and beef.\textsuperscript{213} The United States brought eight of the first

\begin{footnotesize}
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\item[\textsuperscript{210}] See Mark Pollack & Gregory Shaffer, \textit{Transatlantic Governance in Historical and Theoretical Perspective}, \textit{supra} note__, at __; Kevin Featherstone & Roy H. Ginsberg, \textit{The United States and the European Community in the 1990’s: Partners in Transition} (1993); Rene Schwok, \textit{U.S.-EC Relations in the Post-Cold War Era: Conflict or Partnership?} (1991).
\item[\textsuperscript{211}] See, e.g., Hugo Paemen & Alexandra Bensch, \textit{From the GATT to the WTO: The European Community in the Uruguay Round} (1995); Stephen Woolcock & Michael Hodges, \textit{EU Policy in the Uruguay Round, in Policy-Making in the European Union} 301, 321 (Helen Wallace & William Wallace eds., 3\textsuperscript{rd} ed.1996) (“Tensions between the Commission and Council over how the latter should exercise this control function created problems at important stages in the negotiations, inhibiting the Commission’s ability to be flexible and proactive.”).
\item[\textsuperscript{212}] See Paemen & Bensch, \textit{supra} note__, France, for example, had little confidence in the EC’s ability to negotiate on France’s behalf in agricultural trade liberalization. See Lionel Barber et al., \textit{U.S. Stands Ground on Farm Pact: Statement as France Renews Threats to Veto GATT Deal}, Fin. Times, Sept. 23, 1993, at 26; \textit{Except Us, Economist}, Oct. 16, 1999 (quoting French Prime Minister Alain Juppé’s 1993 statement that, “We do not trust you, Monsieur Brittan, and we will never trust you,” addressed to Sir Leon Brittan, the EC trade commissioner and chief trade negotiator). These divisions were less pronounced in other trading sectors. For example, in “the services and IPR negotiations,... there was broad support for the policies pursued.” Stephen Woolcock & Michael Hodges, \textit{EU Policy in the Uruguay Round, in Policy-Making in the European Union} 301, 321 (Helen Wallace & William Wallace eds., 3\textsuperscript{rd} ed.1996). See also Alasdair Young, \textit{Extending European cooperation: The European Union and the ‘New’ International Trade Agenda}, EU Working Papers RSC No. 2001/12: European University Institute, at 21 (2001) (the concern that the EC has been constrained “from acting coherently and effectively in international trade negotiations... is exaggerated.”).
\item[\textsuperscript{213}] See Request for Consultations by Guatemala, Honduras, Mexico and the United States, \textit{European Communities—Regime For The Importation, Sale And Distribution Of Bananas}, WT/DS16/1 (Oct. 4, 1995) (stating that the communication for consultation was dated in September 1995); Request for Consultations by the United States, \textit{European Communities - Measures Concerning Meat And Meat Products (Hormones)}, WT/DS26/1 (Jan. 31,
fourteen WTO complaints resulting in panel decisions, and was the object of only three challenges. The EC, on the other hand, was a defendant in five of these first fourteen cases (three brought by the United States) and was challenger only once (and that, a case also brought by the United States and Japan against Indonesia’s national car regime).214

The EC’s role was soon to change, as the European Commission felt pressured to take an initiative. In February 1996, the European Commission did so, announcing a new “Market Access Strategy” whose aim was to make the EC’s trade policy more proactively focused on opening foreign markets for EC firms, rather than on defending the EC’s domestic market from foreign goods. The Strategy’s essence has been to comprehensively identify foreign barriers to EC imports, prioritize them, and press foreign governments to eliminate them. Sir Leon Brittan, the EC’s liberal Trade Commissioner, officially announced the Market Access Strategy not before an audience of member state bureaucrats, but at a business symposium to which executives from major EC exporting companies were invited. There, he declared a “D-Day for European Trade Policy,” promising “We are going onto the offensive, using our trade powers forcefully but legitimately to open new markets around the world.” 215 These highly publicized remarks marked a sea change from the EC’s more prudent, inward-looking, reactive trade policy of the past. Europe was again on the conquest for new markets, this time not with guns and war ships, but with electronic data banks and legal briefs.

Commissioner Brittan established within the trade directorate a new “Market Access Unit” whose primary role was to interact with EC business interests concerning the trade problems they faced. His goal was to target more Commission resources at opening foreign markets. The Unit created an immense database listing foreign trade barriers by sector and country. The list grew from 350 identified trade barriers in early 1996, to 800 in early 1997, to more than 1,200 in 1998.216


216 The Market Access database is available on the Internet at http://mkacdb.eu.int. The data was obtained in a telephone interview with Dorian Prince, former head of the Market Access Unit, on March 5, 1998, and confirmed in a subsequent interview with him on June 28, 1999 in Brussels [hereinafter respectively 1998 Prince Interview and
Unit estimated that over 90 percent of the identified trade barriers were reported by businesses or their trade associations. Use of the site rose exponentially, from an average of 30,000 contacts per day in early 1996, to 60,000 in early 1997, to more than 150,000 daily contacts in 1998. The Commission estimates that over 55 percent of these daily queries came from companies employing fewer than 400 people.

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

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

Given the USTR’s unilateral use of Section 301—in particular in the heyday of the 1980s—to muscle foreign countries to import U.S. products, U.S. firms knew that the USTR fought for their export interests. European firms had no such faith. In fact, the more trade liberal-oriented countries in Europe, such as Germany, the Netherlands and the UK, opposed the EC’s early version of Section 301, the New Commercial Policy Instrument (NCPI), and worked to impede its effective implementation. In the early NCPI case brought by the Dutch company AKZO against a controversial United States law barring imports on intellectual property grounds (Section 337 of the 1974 Trade Act), the Dutch government opposed and tried to obstruct the EC’s bringing of the GATT case. The Dutch and other export-oriented EC member states feared that permitting private firms to bring NCPI cases could trigger a mercantilist unraveling of the liberal trade regime, not its enforcement.

Brittan’s trade directorate-general, however, significantly altered the EC’s outlook on the offensive use of the WTO dispute settlement system. Commission units now systematically investigate barriers to EC trading interests, using the database as an organizational resource. An EC

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223 See infra notes ___.

224 Interviews with members of the Brussels trade bar and a former member of the Commission’s legal services in Brussels (June 22, 1999). For the NCPI case, see OJEC 1986 C25/20. For the GATT Section 337 case, see United States– Section 337 of the Tariff Act of 1930, 1989 WL 587604 (GATT Jan. 16, 1989).
inter-agency group, the Market Access Action Group, consisting of representatives from different directorate-generals, directorates, units and desks within the Commission, periodically meets to assign responsibility for investigating trade barriers and to prioritize them.\textsuperscript{225} In the investigation, the Commission determines whether the trade barrier exists, whether it constitutes a violation of a trade agreement, and the extent of its economic impact on the EC.\textsuperscript{226}

To implement the Market Access Strategy, the European Commission has attempted to forge better direct working links with EC private enterprises and trade associations. The Commission requires private sector input, especially as regards the detailed facts of a potential case, if it is to successfully litigate or threaten litigation before the WTO. Many EC business associations have responded, albeit more slowly than in the United States. As Tim Jackson of the Scotch Whisky Association states, “We must... be ready to assist the Commission (which sadly does not have unlimited resources to pursue such matters) often at very short notice when a WTO case is under way. For example, during the Japan case we had to commission market research to help the Commission refute some of Japan’s initial submission... It is a ‘partnership’ exercise with other industry colleagues, respective Governments and the Commission.”\textsuperscript{227} Jackson noted that the association was also “assisting the Commission by gathering market information/research for their Korea and Chile cases.”\textsuperscript{228}

These Commission investigations and public-private collaborations have resulted in the

\textsuperscript{225} The Commission investigation will typically be conducted by the Market Access Unit in an Article 133 proceeding, although other Units of DG1 could take primary responsibility. Safeguards and subsidy cases, for example, will involve the safeguards and subsidy units in the trade directorate. In a TBR case (described below), the Commission’s TBR unit conducts the investigation. The group met less frequently in 2001-2002 (around every two months) than it did in the late 1990s (almost every week), since much business is now conducted by e-mail. Stewart 2002 Interview, \textit{supra} note...

\textsuperscript{226} Before consulting a foreign government, the Commission, for its own internal purposes, will analyze whether the alleged trade barrier is in violation of a provision of a WTO agreement or of one of the more than 100 bilateral and regional agreements signed by the EC. 1998 Prince Interview, \textit{supra} note...

\textsuperscript{227} SWA May 1997 Remarks, \textit{supra} note....

\textsuperscript{228} \textit{Id.} Jackson added, “Bilateral pressure can be effective and is a natural first step in registering disapproval with a foreign government- a good example is Korea where following such continued pressure from the Commission (and our Government) the Korean Government significantly reduced the discrimination against imported spirits- as a result a $20 million ECU market has grown to one in excess of $120 million ECU in the space of 10 years. Discrimination still exists but encouragingly last month the EU Member States agreed to request WTO consultations with Korea about the outstanding discrimination,” \textit{id.} The EC subsequently won the case. \textit{See supra} note...
Commission requesting more consultations before the WTO dispute settlement body since 1997 than any other WTO member, including the United States. During the first two years of the WTO’s existence, while the United States filed twenty-one WTO complaints (resulting in eight panel reports), the Commission filed eight complaints (resulting in only one panel report). From 1997-1999, however, the situation reversed. The Commission initiated thirty-one new WTO complaints (resulting in twelve panel reports), compared to eighteen initiated by the United States (resulting in four panel reports). Moreover, between January 2000 through the first ten months of 2001, the Commission brought seven of its nine WTO claims against the United States, while the United States, stung by the EC’s successful case against U.S. tax subsidies for export-oriented “Foreign Sales Corporations,” only brought one of its nine claims against the EC. The Commission

229 This was the Indonesia-automobiles case in which the United States was co-complainant.

230 See Overview of State of Play of WTO Disputes, supra note____. In addition, the EC has been more active than any other WTO member in negotiating bilateral free trade agreements. The EC contains a list of these agreements on its Web site at http://europa.eu.int/comm/trade/pdf/ecrtagr.pdf (visited May 14, 2001). See also Gary Yerkey, Business Execs Call on U.S. to Retake Leadership on Trade, Citing European Gains, 18 INT’L TRADE REP (BNA) 260-261 (Feb. 15, 2001) (noting number of free-trade pacts the EU has signed since the conclusion of the Uruguay Round). The WTO 2001 Annual Report states the EU was involved in the highest number of regional trade agreements. Report available at http://www.wto.org.

231 See European Commission News Release on Request to WTO Compliance Panel for Imposition of Sanctions in US, FSC Dispute, with Indicative Product List. 17 INT’L TRADE REP. (BNA) 1792 (Nov. 23, 2000), (stating "the EU has requested the WTO to authorize trade sanctions on the United States up to a maximum amount of $4.043 billion in the Foreign Sales Corporation (FSC) trade dispute. This amount is based on the value of the subsidy granted by the US under the FSC scheme which the WTO found to be illegal earlier this year."). As one Washington trade lawyer remarked, “the way to understand the FSC case for the EU is not about getting $4 billion, but to emasculate U.S. trade policy and force the United States to deal with the EU in a bilateral relationship.” Interview in Washington DC (Oct. 18, 2001).

232 The one complaint that the United States initiated against the EC was EC- Tariff-rate quota on corn gluten feed from the United States, and was a relatively ineffective retaliatory claim against the EC’s successful WTO challenge against a safeguard measure on wheat gluten. See supra note.... (on the wheat gluten case). The EC brought the seven following cases against the United States during this same time period: United States-Definitive safeguard measures on imports of steel wire rod and circular welded carbon quality line pipe; United States-Countervailing duties on certain corrosion resistant carbon steel flat products from Germany; United States-Countervailing measures on certain products from the EC. United States- Anti-dumping duties on Seamless pipe from Italy; United States- Continued Dumping and Subsidy Offset Act of 2000. United States- Section 306 of the Trade Act of 1974 and amendments thereto; United States-Section 337 of the Tariff Act of 1930 and amendments thereto. See generally Jenna Greene, U.S. Trade Laws in Cross Hairs of WTO Member Nations, LEGAL TIMES (Nov. 7, 2001) (noting “A Legal Times analysis of all WTO decisions shows that U.S. fortunes in the last two years before the Geneva-based body have taken a sharp downward turn. During this period, the United States has been named in complaints far more often than any other country, and has lost about 70 percent of all cases.”).
desired to show member states and European industries that it could effectively defend their interests abroad. The early flurry of U.S. cases against the EC helped spur it to do so.

B. Alternative EC Tracks for Challenging Foreign Trade Barriers. As the Commission has reached out toward European industry on external trade matters, and as the Commission has brought more WTO complaints, private firms have become more aware of the internal EC legal channels available to them to challenge foreign trade barriers. Under the EC system, private firms have a choice of two internal procedures that each may culminate in the EC’s initiation of a formal complaint before the WTO’s Dispute Settlement Body: the traditional “intergovernmental” Article 133 procedure and the newer Trade Barrier Regulation (TBR). As part of its Market Access Strategy, the European Commission has actively promoted business use of the TBR which (analogous to Section 301) grants private enterprises rights to have the Commission investigate foreign trade barriers that affect them. Although the TBR is gaining acceptance, the Article 133 process nonetheless remains far more commonly used. The EC brought twenty-six of its first twenty-seven WTO complaints via the Article 133 procedure. However, from March 16, 1998 to May 7, 1999 the EC brought one-third (five of sixteen) of its new claims pursuant to the TBR, and it brought three more TBR-initiated claims to the WTO in late 1999 and early 2000, two against Brazil and one against Chile. European firms have now seen how TBR can be successfully deployed, leading

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233 By January 1999, the percentage of TBR claims as a proportion of all EC claims referred to the WTO Dispute Settlement System had risen to around 20 percent. See presentation by Sir Leon Brittan, Removing Barriers to Trade: The EU’s Market Access Strategy, speech to the Brussels Chamber of Commerce, Brussels, Jan. 28, 1999. Two of the six WTO complaints brought via the TBR involved the same matter—U.S. rules of origin for silk products. This matter was provisionally settled by an exchange of letters between Sir Leon Brittan on behalf of the EC and Charlene Barchesky on behalf of the United States. Disagreement over the United States’ implementation of the settlement, however, led the EC to file a second complaint before the WTO’s dispute settlement body. This latter complaint, concerning the United States’s application of the earlier letter agreement, was also settled. See infra note... The other four referred TBR matters were Japan-Imports of Finished Leather; United States-Anti-Dumping Act of 1916; Argentina-Exports of Hides; and Imports of Finished Leather and United States-Licensing of Musical Works. See Jean Charles Van Eeckhaut, Private Complaints against Foreign Unfair Trade Practices: The EC’s Trade Barriers Regulation, 33 J. OF WORLD TRADE 199, 212 (1999) (providing an overview). The EC won both cases against the United States and the case against Argentina before the WTO. It is still in consultations with Japan. See Le Reglement sur les Obstacles au Commerce, 203 ECONOMIE: LES ECHANGES 1, 10-11 (March 16-23, 2001) (on file with author).

234 The EU and Chile announced on January 25, 2001 the settlement of their trade dispute involving Chile’s ban on foreign fishing vessels catching swordfish. As a result, the EU stated that it would ask the WTO panel to suspend its work. The settlement will allow EU fishing boats limited access to Chilean ports as part of a scientific evaluation
them to file more cases.\textsuperscript{235} The increased use of the Trade Barrier Regulation has signaled a shift toward enhanced public-private coordination in Europe, since firms have begun to play a more integral role in the process. This shift, in turn, has shaped use of the less transparent Article 133 procedure, as private enterprises increasingly work with the Commission and member states behind-the-scenes to rally support for their claims.

Most scholarship on EC trade law focuses on the relative roles and competencies of the EC member states and Commission over European trade policy.\textsuperscript{236} In contrast, this section explains how EC procedures have been used in practice by the Commission to forge EC public-private networks operating in the shadow of international economic law.

1. The Article 133 Process: Inside the Labyrinth. The EC’s traditional means for initiating trade complaints in the GATT (and now the WTO) is through what is known as the Article 133 process. Under Article 133 (originally numbered Article 113) of the EC Treaty,\textsuperscript{237} all decisions for “implementing” the EC’s “common commercial policy” are to be made by the Council (or more

\begin{itemize}
\item[\textsuperscript{235}] See infra notes... and accompanying text.
\item[\textsuperscript{236}] See e.g., Sophie Meunier & Kalypso Nikolaidis, Who Speaks for Europe? The Selection of Trade Authority in the EU, 37 J. COM. MARKET STUDIES 477 (Sept. 1999); Sophie Meunier, What Single Voice? European Institutions and EU-U.S. Trade Negotiations, 54 INT’L ORGANIZATION 103 (winter 2000); Peter Van den Bossche, The European Community and the Uruguay Round Agreements, in Implementing the Uruguay Round 23 (John Jackson and Alan Sykes, eds., 1997) (addressing “the competence and conduct of the European Community in international economic relations); N. Emiliou & D. O’Keefe, The European Union and World Trade Law (1991); The European Community’s Commercial Policy After 1992: The Legal Dimension (Mark Maresceau ed., 1993); I. Macleod et al., The External Relations of the European Communities (1996). Much of this literature addresses the formal competence to negotiate, sign and approve agreements (such as the Agreement Establishing the WTO, as opposed to the implementation and enforcement of such agreements once signed. This book addresses this latter issue.
\item[\textsuperscript{237}] The provision governing EC authority over trade policy was initially numbered Article 113 of the Treaty Establishing the European Community. The Treaty of Amsterdam, ratified in May 1999, amended this Treaty by adding new provisions and eliminating outdated ones. In the process, the articles of the Treaty were renumbered. Article 113 became Article 133.
\end{itemize}
The Council operates through sectoral variants, although external commercial policy is typically handled through the General Affairs Council, which consists of the foreign affairs ministers of the fifteen member states. (The General Affairs Council is sometimes referred to as the Foreign Affairs Council, and informally as the “senior” Council). The two most important sectoral variants of the Council are the Agricultural and Ecofin (economic and finance) Councils. For an overview of the Council and its sectoral variants, see Fiona Hayes-Renshaw and Helen Wallace, The Council of Ministers 14-15, 29-33 (1997); and Simon Hix, The Political System of the European Union 63-68 (1999). For ease of reference, this book will refer generically to the Council.

238 The EC institutions have exclusive competence over matters involving the sale of goods. However, the European Court of Justice’s Opinion 1/94 (World Trade Organization) (1994 E.C.R. I-5267, Nov. 15, 1994) held that the member states retain competence over most matters covered by the WTO TRIPs (Trade Related Aspects of Intellectual Property Rights) and GATS (the General Agreement on Trade in Services) agreements. As regards trade in services, the Court held that the EC institutions have exclusive competence only where the provision of the service does not involve any movement of persons or a foreign commercial presence (par. 43-45), or involve an area in which the EC has achieved complete harmonization internally or has otherwise expressly conferred negotiating powers on Community institutions (par. 95-97). As regards intellectual property rights, the Court held that EC institutions have exclusive competence only as regards the prohibition of “the release into free circulation of counterfeit goods” (par. 55-56), unless full harmonization has been accomplished internally (par. 102-103). In the Treaty of Nice, however, the member states agreed, subject to the Treaty’s ratification by all fifteen member states, to modify Article 133 to provide in its paragraph 5 that EC exclusive competence over a common commercial policy “shall also apply to the negotiation and conclusion of agreements in the fields of trade in services and the commercial aspects of intellectual property,” subject to exceptions for “trade in cultural and audiovisual services, educational services, and social and human health services,” as well as “agreements in the field of transport.” Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 2001 O.J. C(80/15-16).

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

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

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

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

contact in Brussels, facilitating the formation of EC public-private partnerships. In short, the Commission is the primary EC authority for implementing EC trade policy.

Although, formally, the General Affairs Council is to make all decisions on “implementing” the EC’s external commercial policy, its authority is (at best) ambiguous, in particular as regards the bringing of WTO trade complaints. First, since Article 133 refers to “negotiations” of trade agreements and not litigation under them, the Commission maintains that it is solely competent to decide whether to bring a trade complaint in implementation of these agreements.\(^{241}\) The EC Treaty, however, is silent on this point and the member states could amend it to clearly place these powers in the Council were the Commission not to heed member state views. Consequently, to maintain good relations with the Council, the Commission always obtains de facto approval of at least a qualified majority of the Article 133 Committee before initiating a WTO complaint.\(^{242}\) Although the Commission has filed a third party submission before a WTO panel when this was not supported by a qualified majority, the submission was an exception and, in any event, only involved the EC’s taking a position in a third party dispute.\(^{243}\) Second, the General Council only meets about once per month to discuss selected matters of political importance and will rarely discuss matters brought before the Article 133 Committee, and (to this author’s knowledge) never in respect of the implementation of trade agreements. The Council thus has delegated most of the Council’s powers over trade matters (whatever they may be) to the Article 133 Committee, which, in turn, has deferred to the Commission.

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\(^{242}\) Interview with official in the Commission’s Trade Directorate-General in Brussels (June 16, 2001) (maintaining that the Commission uses the Article 133 Committee “as a sounding board” to ensure that it is “on the right track”).

\(^{243}\) The Commission filed a third party submission in support of Canada’s and Brazil’s claims before WTO panels against each other’s aircraft subsidies, even though member states were divided because suppliers of airline parts from certain member states benefitted from the subsidies, while others were harmed. This information was confirmed in an interviews with a member state representative to the Article 133 Committee in Brussels (June 23, 1999), and a Commission official in DG Trade, Brussels, June 24, 1999.
The Article 133 Committee, which also consists of one representative from each member state, originally was created to “consult” with the European Commission in an advisory capacity about the Commission’s implementation of Council decisions.\textsuperscript{244} The Committee, however, exercises authority informally. The Committee almost never takes a vote in its meetings. However, votes are usually not necessary since decisions are typically made by consensus. If no member state formally objects, the member state Chair\textsuperscript{245} of the Article 133 meeting simply notes whether sufficient votes are present in support of the measure and, if so, concludes the meeting by confirming the decision made.\textsuperscript{246} The Commission thereby informally is authorized to proceed with the action that it proposed.

In theory, if a member state objects to a matter, the Commission should refer the matter to COREPER (the EC’s Committee of Permanent Representatives), the body immediately below the Council.\textsuperscript{247} If COREPER were likewise unable to resolve the matter by unanimity, it would, in turn, refer the matter to the Council, which would then make a decision by a “qualified majority vote,” as provided under the Treaty.\textsuperscript{248} However, the Article 133 Committee practically never refers trade

\textsuperscript{244} For an overview of the Article 133 Committee, \textit{see} HAYES-RENSHAW AND WALLACE, THE COUNCIL OF MINISTERS, \textit{supra} note..., at 86-90. There are informal “sub-groups” of the Article 133 Committee involving services, automobiles, steel and mutual recognition agreements. Interview with a Commission Official in DG Trade (June 16, 2001).

\textsuperscript{245} The Chair of the meeting is a representative of the member state that holds the Presidency of the Council at the time. The Presidency of the Council rotates every six months among the fifteen member states. The Presidency in 1999, 2000, 2001 and 2002 will have been held respectively, in order, by Germany, Finland, Portugal, France, Sweden, Belgium, Spain and Denmark.

\textsuperscript{246} Interview with Michael Johnson, a former Article 133 representative from the United Kingdom, now an international trade consultant with Malmgren Golt Kingston & Co. Ltd. in London (March 5, 1998). \textit{See also} MICHAEL JOHNSON, EUROPEAN COMMUNITY TRADE POLICY AND THE ARTICLE 113 COMMITTEE (The Royal Institute of Internal Affairs, 1998)[hereinafter JOHNSON, ARTICLE 133 COMMITTEE].

\textsuperscript{247} The term in French is the Comite des Representants Permenantes or COREPER. For an overview of COREPER, \textit{see} HAYES-RENSHAW AND WALLACE, THE COUNCIL OF MINISTERS, \textit{supra} note..., at 72-84.

\textsuperscript{248} Decisions on Article 133 matters are, technically, to be made by the Council by “qualified majority vote” (QMV). Under the EC system, votes on decisions to be taken by QMV are weighted per country, so that larger countries such as Germany have more votes than smaller ones. Article 205 of the EC Treaty, as amended, sets forth the number of votes each member state holds on the Council, and the number of votes required to adopt an act by QMV. Sixty-one out of a total of eighty-seven votes are required to pass an act by QMV following a Commission proposal.
matters to COREPER. Neither Committee members nor the Commission wish to transfer decision-making authority on trade matters from themselves, who are trade specialists, to the Council, which consists of foreign affairs ministers.

The member state trade officials on the Article 133 Committee, in turn, do not play the primary role in implementing EC trade policy, including whether to initiate a WTO complaint. The Commission does. First, not even the highest ranked members of the Article 133 committee, the “titulaires,” authorize most EC actions, as they only meet once per month in Brussels. Rather, the lower-ranked “deputies” meet almost every Friday in Brussels and typically informally authorize the initiation of WTO proceedings and other EC measures. Second, the deputies typically defer to Commission representatives, who set the agenda for all Article 133 Committee meetings. The Commission determines whether to raise a matter for the Committee’s attention, when to raise it, and

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249 In fact, to this author’s knowledge, the Article 133 Committee has referred only one EC complaint before the WTO to COREPER, and that was the politically-charged complaint over the United State’s Helms-Burton legislation that involved extraterritorial sanctions. Interviews with Commission and member state representatives in Brussels, June 23, 1999 and June 16, 2001.

250 Confirmed by member state representative to article 133 committee. Interview, Brussels, June 25, 1999. See also HAYES-RENSHAW AND WALLACE, THE COUNCIL OF MINISTERS, supra note..., at 90. Foreign affairs representatives sitting on the Council are the member state analogues to the U.S. Secretary of State, while the “titulaires” on the Article 133 Committee are the member state analogues the USTR. However, since most de facto authority over the implementation of EC trade policy resides in the Commission, the actual analogue to the USTR is the Trade Commissioner, who, as of November 1, 2001, is Pascal Lamy. The permanent representatives in COREPER also “are senior officials from the national ministries of foreign affairs, with the rank of ambassador. See The Council of Ministers, supra note..., at 74.

251 Interview with Commission official in DG Trade, Brussels (June 16, 2001). The fifteen members of the Article 133 Committee are generally the most senior trade officials in the relevant civil services of each of the fifteen member states. These representatives, referred to as “titulaires,” typically meet in Brussels only once a month (typically the last Friday of the month) unless a special meeting is called on an extraordinary matter. The EC Trade Commissioner, Mr Pascal Lamy as of November 1, 2001, attends these monthly meetings. The EC challenge against U.S. tax legislation involving “foreign sales corporations” as a WTO-prohibited subsidy, for example, was decided at the titulaires level, but this case involved a politically-charged exception to the general rule, id.

Otherwise, lower-level “deputies” from the member states, together with representatives from the member states’ permanent missions in Brussels, meet on a weekly basis (typically each Friday in Brussels ). The Director-General of the Trade DG, who is Mr. Peter Carl as of November 1, 2001, attends the weekly meetings with the deputies. The deputies also attend the monthly meeting of the titulaires. All national representatives are, in turn, assisted by members of the Council’s permanent secretariat in Brussels, which provides administrative assistance for all Article 133 committee meetings. Id. See also JOHNSON, ARTICLE 133 COMMITTEE, supra note...
how to raise it. The deputies then indirectly authorize EC actions, including the filing of a WTO complaint, by not opposing (in sufficient numbers to eliminate a qualified majority) a proposal or position paper submitted by the Commission.

As Weber noted in his work on bureaucratic authority, when issues (in this case, trade law issues) become more numerous and complex, a bureaucracy’s grasp of the underlying facts and specialized understanding of law augment its (in this case, the Commission’s) authority. Although member states may predominate in the determination of the EC’s positions in trade negotiations, with the Commission acting as a “promotional broker” in the formation of such positions and an agent with some discretion in their negotiation, the Commission dominates the EC’s initiation of

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252 The Commission’s authority is bolstered because the Article 133 Committee’s decisions are based on its position papers and written proposals. The Council secretariat assigned to the Article 133 Committee circulates the agenda for all Committee meetings. Most agenda matters are referred to it by Commission officials, although member state representatives also refer some matters through the presidency. Interview with Commission official in Trade DG (June 16, 2001). The agenda shown to the author while in Brussels, for example, contained one matter referred by a member state and twelve by the Commission. The author was informed that this was representative of a typical Article 133 Committee agenda.

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


253 The final decision to initiate a WTO complaint is typically made by the Trade Commissioner, Mr Pascal Lamy as of November 1, 2001, and not by the College of Commissioners. Interview with member of Mr Lamy’s cabinet in Brussels (June 18, 2001).

254 As Weber writes, “bureaucratic organizations, or the holders of power who make use of them, have the tendency to increase their power still further by the knowledge growing out of experience in the service. For they acquire through the conduct of office a special knowledge of facts and have available a store of documentary material peculiar to themselves.” See Max Weber, The Theory of Social and Economic Organization 339 (A.M. Henderson & Talcott Parsons trans., 1947). In the case of the Commission’s role in challenging trade barriers, Commission investigations permit the Commission to have more detailed knowledge of the impact of the trade barrier in question, and Commission officials’ grasp of the underlying facts enhances their authority in discussions with the member state representatives.

WTO trade complaints and settlement negotiations in the shadow of the WTO dispute settlement system. This is because the Commission has acquired greater expertise in handling the technicalities and increasing demands of WTO law. Only the Commission investigates, defends and challenges trade barriers before the WTO’s Dispute Settlement Body, and thus member state representatives lack the Commission’s background knowledge. In the words of one member of the Article 133 Committee, member state representatives typically defer to the Commission as “the professor,” 256 thereby delegating de facto decision-making power to it. Where necessary, the Commission works behind-the-scenes with member state representatives to forge consensus on a matter before formally presenting it to the Committee. Failing consensus, the Commission attempts to ensure that its recommendation is supported by at least a “qualified majority” of member states, in which case, the matter still is not referred to COREPER or the Council, for the institutional reasons noted above. As one Commission official noted, “eventually, we get them.” 257

Many member state representatives, especially those from more liberal-oriented northern states, do not mind “being gotten” by the Commission. They realize that delay and irresolution hamper EC trade policy, especially vis-a-vis the United States. As one northern member of the Article 133 Committee stated, “EC trade policy works by permission of the French.” 258 That is, if other member states interfere too much with the Commission’s work, the “French win” because the Commission’s initiatives toward trade liberalization are slowed. 259 The French representative to the Article 133 Committee confirmed that the French did not object to the current de facto delegation of the Commission as a “promotional broker” compared to a technocrat, see Dietrich Rometsch and Wolfgang Wessels, The Commission and the Council of Ministers, in THE EUROPEAN COMMISSION 202, 208-210 (Geoffrey Edwards & David Spence eds., 1994).  

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256 Interview with a member state representative to the 133 committee who used the term “professor.” (Brussels, June 25, 1999). A representative from another member state’s permanent mission confirmed that the members of the Commission “are specialists because they argue WTO cases,” and that member states “no longer have these types of specialists” so that this “leads to greater deference to the Commission.” Interview in Brussels, June 23, 1999.

257 Interview with Commission official in DG Trade in Brussels (June 21, 1999). In other words, the Commission sometimes must act as a promotional broker where there are member state divisions about initiating a WTO case, but this is the exception.

258 Interview with member state representative to Article 133 Committee in Brussels (June 23, 1999).

259 Id.
of decision-making to the Commission for the bringing of trade claims, provided that the Commission is successful.\textsuperscript{260}

Because the Commission’s \textit{de facto} powers have increased, European businesses can work more effectively with a central contact in Brussels on international trade matters, either bypassing national authorities or (more typically) working in coordination with them. Businesses thereby may play more active roles despite the reputation of the Article 133 process as an “intergovernmental” procedure, and despite the fact that Article 133 meetings take place behind closed doors without private parties present. Guided by a Commission representative, sophisticated businesses can ensure sufficient support within the Article 133 Committee prior to the Commission’s submission of a proposal. Where needed, they can coordinate positions with businesses in other states so that each respectively contacts its member state representative for endorsement. If a matter is raised at an Article 133 Committee meeting, the meeting may merely formally ratify a decision that has already been made. For example, although the UK’s Scotch Whisky Association played the leading role in the Japan, Korea and Chile alcohol cases,\textsuperscript{261} it also worked with the European-wide trade association CEPS (the Confederation of European Producers of Spirits) and CEPS’s constituent members. These included French cognac producers who contacted French representatives. As Tim Jackson of The Scotch Whisky Association confirms, the process “involved preparing, researching and communicating our case effectively on a persistent basis, for a very long period of time, to our respective Governments and to the Commission.”\textsuperscript{262} While some member states “rolled their

\textsuperscript{260} The French are, however, more circumspect regarding the Commission’s negotiating authority. For example, they immediately opposed Commissioner Brittan’s proposal for the creation of a New Transatlantic Marketplace, or North Atlantic Free Trade Area. Brittan eventually had to abandon this proposal, resulting in the much vaguer Transatlantic Economic Partnership. \textit{See} Neil Buckley, \textit{Brittan Bid To Revive Plan For US Partnership}, FIN. TIMES, Sept. 15, 1998, at 5.


\textsuperscript{262} \textit{See SWA May 1997 Remarks}, supra note _\textsuperscript{261}. As Christopher Boyd, Senior Vice President of Environment and Government Affairs of Lafarge SA, a global manufacturer of construction products, such as cement, confirms more generally in an interview, “What is government affairs? It is the three I’s”—that is, “information,” “image” and “influence.” \textit{See Powers of Persuasion}, supra note _\textsuperscript{261}. 
eyeballs” at the number of EC cases brought in support of the UK spirits industry, the cases nonetheless went forward.

Although there is some ambiguity regarding the European Commission’s authority for the implementation of the EC’s common commercial policy, the Commission clearly plays the dominant role, albeit after notifying and attaining the Article 133 Committee’s informal approval. The consolidation of trade authority in a single European institution facilitates greater business input in EC decisions over trade disputes. Businesses increasingly can work behind-the-scenes with EC officials to more effectively challenge foreign barriers to their exports. The WTO’s legalized structure and the Commission’s Market Access Strategy so induce them. As European businesses learn to profit from the WTO dispute settlement system, they increasingly attempt to use this reputedly “intergovernmental” Article 133 mechanism.

2. The Trade Barrier Regulation: Europe’s Reply to U.S. Section 301. European businesses have a more direct track to solicit Commission representation of their interests—the Trade Barrier Regulation (TBR), enacted in December 1994 in anticipation of the WTO’s formation. The TBR grants individual private enterprises legal rights to petition the European Commission to investigate trade matters and bring trade claims on their behalf. The TBR replaced an earlier analogous regulation that European businesses largely ignored—the New Commercial Policy Instrument (NCPI). The Council enacted the NCPI in 1984 in response to measures taken by the United States under U.S. Section 301 against EC steel and agricultural interests. The French government, in

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263 The quote is from a member of the Article 133 Committee. Interview in Brussels (June 23, 1999).


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

266 The NCPI’s formal name is Council Regulation 2641/84 of 17 September 1984 (on the Strengthening of the Common Commercial Policy with Regard in Particular to Protection Against Illicit Commercial Practices), 1984 O.J. (L252) 1 [hereinafter NCPI].
particular, promoted the NCPI to create a counterpart to U.S. Section 301.267 European businesses were not enticed. They filed only seven NCPI petitions during its ten-year history. Moreover, the Commission rejected two of the seven petitions on the grounds that the complainant failed to present sufficient evidence of an “illicit commercial practice.”268 Member states interfered with others.269

Because the NCPI was ineffective, the French pressed for a new regulation with more flexible procedural requirements. Northern liberal-oriented member states, such as Germany, the Netherlands and the United Kingdom, again initially objected, fearing that the regulations would be used for protectionist purposes.270 The Trade Barrier Regulation was nonetheless enacted as part of an EC package deal pursuant to which the French supported signature of the Uruguay Round Agreements, including the Agreement on Agriculture, in return for passage of the TBR and guaranteed EC support of French agriculture.271 Since its inception, the Commission has only deployed TBR offensively to challenge foreign trade barriers, and not defensively in protection of the EC’s internal market.272 For this reason, as well as the relatively greater acceptance among WTO members of resort to WTO litigation, all EC member states now support the TBR’s application.273


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

269 See supra note ____ and accompanying text.


271 The TBR was ultimately enacted by consensus. See Youri Devuyst, The European Union and the Conclusion of the Uruguay Round, in The State of the European Union, Vol. 3, Building a Polity? 449-467 (Rhodes et al. eds., 1995) (also noting the use of sectoral side-payments to the Portuguese textile industry to secure the assent of a reticent Portuguese government for the conclusion of the Uruguay Round).

272 See Candido Tomas Garcia Molyneux, Domestic Structures and International Trade: The Unfair Trade Instruments of the United States and European Union 244 (2001). Although the TBR challenge to the Brazilian Export Financing program concerned the impact on the EC and foreign markets of Brazilian export subsidies, this case involved a WTO matter brought be Canada in respect of which the EC filed a third party submission. See supra note...
Unlike the former NCPI, the Trade Barrier Regulation permits individual businesses to petition the European Commission to initiate a WTO complaint, and does not require the support of an entire EC industry. The TBR eases, in particular, standing requirements and requirements to prove “injury.” Under the NCPI, an enterprise had to demonstrate that it was acting “on behalf of a Community industry” in order to lodge a complaint. Under the TBR, an enterprise may now lodge a complaint on its own behalf. See TBR, art. 4, supra note.... The injury requirement has also been relaxed under the TBR to that of a “material impact on . . . a sector or economic activity . . . of the Community or a region” (emphasis added). This is in contrast to the NCPI requirement to prove “injury” to a “Community industry.” See NCPI, arts. 2.3, supra note...

Businesses thus collaborate with the Commission in applying the regulation, forming ad hoc public-private networks as in the United States. Businesses choose which mechanism to use–TBR or the Article 133 route–in consultation with, and in response to, the Commission’s advice. When Volkswagen, for example, complained to the Commission about a problem that it encountered with Colombian tax measures on automobiles, the Commission advised it to file a TBR complaint. Volkswagen’s attorneys twice came to the Commission with drafts on which Commission officials made suggestions for improvement, before Volkswagen finalized its submission.

Businesses sometimes have deferred almost entirely to the Commission as to whether to proceed via the TBR or Article 133 process. For example, while the Italian silk federation, FEDERTESSILE, formally filed an early TBR complaint against the United States’ application of

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274 The TBR eases, in particular, standing requirements and requirements to prove “injury.” Under the NCPI, an enterprise had to demonstrate that it was acting “on behalf of a Community industry” in order to lodge a complaint. Under the TBR, an enterprise may now lodge a complaint on its own behalf. See TBR, art. 4, supra note.... The injury requirement has also been relaxed under the TBR to that of a “material impact on . . . a sector or economic activity . . . of the Community or a region” (emphasis added). This is in contrast to the NCPI requirement to prove “injury” to a “Community industry.” See NCPI, arts. 2.3, supra note...

275 Although the Trade Barrier Regulation grants enterprises legal rights to force the Commission to act on their behalf, private firms realize that antagonism is self-defeating. In consequence, there have so far been no legal challenges to Commission decisions under the TBR. See Marco Bronckers & Natalie McNeils, The EU Trade Barriers Regulation Comes to Age, 35 J. OF WORLD TRADE 427, 449 (2001). There was, however, one formal challenge to the Commission under the New Commercial Policy Instrument, the predecessor to the TBR. In that case, the European Court of Justice held that a claim was admissible which challenged the Commission’s refusal to take action pursuant to the NCPI against Argentinian trade practices. The Court, however, held against the plaintiff on the grounds that the Argentinian practices did not violate GATT. See Federation de l’Industrie de l’Huilerie de la CEE (FEDIOL) v Commission, Case 70/87 (1989), ECR 1781.

276 Interview with Commission official in the TBR unit in Brussels (June 13, 2001).
rules of origin to Italian silk products. FEDERTESSILE had not even heard of the TBR until the Commission, in search of successful test cases, suggested it. FEDERTESSILE was represented by no outside or in-house counsel. Rather, the Italian silk federation was entirely dependent on the Commission to prepare its complaint and lead it through the TBR procedure. It supplied the Commission with all relevant factual information for purposes of the Commission’s investigation, the WTO filing, consultations and ultimate settlement with the United States. The public-private partnership, formed at the Commission’s instigation, was a success for both parties. U.S. rules of origin were modified to the Italian silk industry’s satisfaction. The Italian silk industry sung the Commission’s praises. The Commission, in turn, touted the silk case as a great success. The Commission now could better promote business use of the Trade Barrier Regulation.

TBR cases, in particular, require producer input since they are often factually-intensive. Cases involving foreign administrative practices, for example, require ongoing EC public-private monitoring to attempt to check foreign abuses. The TBR case concerning Argentine import practices for textiles involved Argentinian customs valuations of a broad array of products. The TBR

277 The Italian silk products were being labeled as products from China, where the fabrics were woven, and not from Italy, where they were dyed and finished. The “made in China” label both undermined the fabrics’ quality claims as Italian high-fashion products and subjected them to quantitative quotas applied to Chinese textiles. See Commission Decision of Feb. 18, 1997 on the initiation of international consultation and dispute settlement procedure. 1997 O.J. (L 62) 43. The United States 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.

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


280 See e.g., Michael Smith, US Accepts EU’s ‘Made in Europe’ Label, FIN. TIMES, August, 8, 1997, at 6 (“The Commission said it was optimistic about other cases in the TBR system.”).

281 Interview with Commission official in TBR unit in Brussels (June 13, 2001).
procedure facilitated the needed public-private collaboration.

TBR is more than a legal procedure; it is a conduit that helps link the public and the private. Members of the TBR unit refer to businesses as their “customers,” customers that, as any good entrepreneur, they seek. As an alternative to the Article 133 process, the TBR procedure encourages businesses to bypass their national representatives and forge ongoing relationships with units within the Commission to monitor and challenge adverse foreign trade practices. Since the TBR’s inception, private business and Commission officials have increasingly worked together so that the Commission needs to spend less time publicizing the instrument. With time and the experience of successful TBR cases, private legal counsel increasingly helps promote the instrument’s use.

3. Differences between the Trade Barrier Regulation and U.S. Section 301: Shrinking in Practice. Many legal commentators have compared the Trade Barrier Regulation and its predecessor (the NCPI) to U.S. Section 301, sometimes maintaining that the TBR is primarily symbolic and not nearly as powerful of an instrument. These commentators initially pointed to two primary

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

283 Private attorneys also have an incentive to publicize use of the TBR procedure. Commission officials report that private businesses are more frequently working with outside legal counsel on TBR complaints than they were at the start. Interview with Petros Sourmelis, official in the TBR unit in Brussels (June 13, 2001). See also the numerous publications by private legal counsel on the TBR instrument, such as by Marco Bronckers, supra note...; Candido Garcia-Molyneux, The Trade Barrier Regulation: The European Union as a Player in the Globalisation Game, 5 European L. J. 375 (works for Hogan & Hartson); Geert A. Zonnekeyen, The EC ‘Trade Barriers Regulation’: More Opportunities for Community Industries? ITLR 143 (1995) (has worked for a number of Brussels law firms); Paulette Vander Schueren-Davide Luff, “The Trade Barrier Regulation and the Community’s Market Access Policy,” 2 EFAR 211 (1996) (Vander Schueren is a partner at Coudert Brothers, Brussels).


285 In a telephone interview with the author, Michael Johnson, a former UK representative to the Article 133 Committee, referred to the TBR as “mere window dressing,” affirming that the Article 133 process is the only one that matters in the EC. Interview in February 1998. For this reason, Mr Johnson focused on the Article 133 process alone in his monograph. See JOHNSON, ARTICLE 133 COMMITTEE, supra note __. See also Richard Steinberg, “The Prospects for Partnership: Overcoming Obstacles to Transatlantic Trade Policy Cooperation in Europe,” PARTNERS
limitations of the TBR that potentially constrain its effectiveness: (i) TBR’s narrower scope; and (ii) TBR’s weaker enforcement measures. However, both aspects are of reduced importance for firms in light of changes in the WTO system. The increased number of TBR filings during the late 1990s, leading to market-opening outcomes, undermines such unfavorable evaluations.

On its face, U.S. Section 301 provides a broader scope of coverage than does TBR since Section 301 can be used as a unilateral instrument. Section 301 thus addresses not only all WTO matters, including new WTO issues such as intellectual property protection and trade in services, but also such non-WTO issues as the protection of investor and labor rights.\(^{286}\) The TBR, in contrast, was designed to facilitate the EC’s bringing of “WTO complaints on behalf of affected EC enterprises. Moreover, the TBR arguably should not cover all WTO rights, much less non-WTO rights. In its Opinion 1/94, the European Court of Justice held that EC member states (and thus not the Commission under the TBR) retained competence over most intellectual property and services matters under the TRIPs and GATS agreements.\(^{287}\) Legally, the TBR therefore should not apply to them,\(^{288}\) although this legal situation will change if the Treaty of Nice (amending the EC Treaty) is ratified by the member states.\(^{289}\)

\(^{286}\) See supra note ____. Moreover, Section 301 covers non-WTO members which, until November 2001, included the Peoples Republic of China.


\(^{288}\) Article 2 of the TBR defines the term “services” as “those services in respect of which international agreements can be concluded by the Community on the basis of Article 113 of the Treaty.” This implicitly incorporates the Court of Justices’ Opinion 1/94 concerning EC competence on trade matters. Although the TBR makes no mention of intellectual property rights, the Court’s ruling on competence in this area automatically applies. In his remarks on the draft TBR when it was being considered for passage, Commissioner Brittan confirmed that “the respective competences of the Commission and the Council concerning the use of the NCPI will be in line with the recent opinion of the European Court of Justice.” Extract of a Speech by Sir Leon Brittan, Commission Press Release IP: 94-1125, Rapid (Nov. 30, 1994). Brittan stated that the TBR’s scope would be “restricted to: (a) areas of exclusive Community competence (trade in goods and in services not implying movement of persons), and (b) individual issues falling within the Community’s competence in the areas of shared competence.” Id.

\(^{289}\) See supra note...
In practice, however, the Commission’s TBR unit has applied the Court’s Opinion 1/94 broadly so that most intellectual property claims have been subsumed. First, the Commission’s TBR unit maintains that all intellectual property claims that have “an impact on trade in goods” are covered by the TBR. Second, where a TBR claim does not affect trade in goods, such as the TBR complaint against a provision of U.S. copyright law that involved royalty payments, the Commission’s TBR unit advances a separate rationale for its competence. Here, the Commission maintained that the U.S. measure regulated a cross-border “licensing service” that did not implicate a movement of persons and thus fell within the EC’s exclusive powers over services trade. No member state challenged the Commission’s action before the Court of Justice because it was not in any member state’s interest to do so, especially given the position of Europe’s intellectual property industry. As a result, four of the first seventeen TBR complaints involved intellectual property issues even though these claims may lie outside of the Commission’s competence.

In addition, Section 301 should provide for more effective coercion since it authorizes the

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

292 The four cases are (i) a claim by French cognac producers against Brazil concerning lack of protection of their “appellation d’origin” (geographic indication rights),
(ii) a claim by an Irish copyright association, the Irish Music Rights Organization, against a section of the U.S. Copyright Act which exempts shops, bars, restaurants and similar public places from having to pay royalties to performing rights organizations,
(iii) a claim by the Consortium of 201 producers of Prosciutto di Parma (the raw ham from the Parma district in Italy) concerning Canada’s failure to recognize and enforce protection of the geographical indication and trademark of Prosciutto di Parma, and
(iv) a claim filed by the pharmaceutical industry against Korea’s patent protection system.

In addition, the TBR is also administering a fifth claim involving intellectual property rights, one that was originally filed under the TBR’s statutory predecessor, the New Commercial Policy Instrument. The International Federation of the Phonographic Industry (IFPI) filed a claim against Thailand in 1991 concerning the enforcement of copyright protection. Thailand adopted copyright legislation in 1995, the implementation of which is under surveillance by IFPI, as well as the Commission’s TBR unit. See Van Eeckhaute, Private Complaints against Foreign Trade Barriers, supra note , at 211. Similarly, even under the former NCPI, four of the seven private complaints concerned intellectual property disputes. See Marco Bronckers & Natalie McNeils, The EU Trade Barriers Regulation Comes to Age, 35 J. OF WORLD TRADE 427, 431 (2001).
USTR to implement unilateral measures in retaliation against foreign trade barriers, even where no international legal obligation has been violated.\textsuperscript{293} Under TBR, in contrast, a complainant may only submit a petition where there is a “right of action established under international trade rules.”\textsuperscript{294} Where the Commission determines that a WTO violation has occurred, the TBR requires the Commission to submit the EC claim before the relevant international tribunal (i.e. before the WTO).\textsuperscript{295} The USTR’s initiation of a Section 301 proceeding thus historically posed a greater threat to a foreign government.

The WTO’s binding dispute settlement system, however, has constrained the United States’ unilateral use of Section 301,\textsuperscript{296} and concomitantly enhanced the EC’s threat of an international trade action.\textsuperscript{297} The EC thus wields greater leverage in threatening to bring an international trade claim than it had in the past, so that foreign parties are more likely to settle a claim after a TBR complaint is filed. Although the Commission commenced no TBR cases during the first twenty-one months of the TBR’s existence, the Commission initiated seventeen TBR investigations between October 1996 and April 1, 2001, three times the number brought under the NCPI over ten years.\textsuperscript{298} In 1997,

\begin{itemize}
  \item \textsuperscript{293} See supra note ____.
  \item \textsuperscript{294} See TBR, article 4. Article 2 defines “international trade rules” as “primarily those established under the auspices of the WTO and laid down in the Annexes to the WTO Agreement, but they can also be those laid down in any other agreement to which the Community is a party and which sets out rules applicable to trade between the Community and third countries.”
  \item \textsuperscript{295} See TBR article 12.2.
  \item \textsuperscript{296} See supra notes ____ (re 1999 WTO panel decision on EC challenge to Section 301 and ff.).
  \item \textsuperscript{297} A defending party, for example, can no longer block the formation of a trade panel or the recognition and enforcement of the panel’s decision. See BHALA & KENNEDY, WORLD TRADE LAW, supra note __, at 38..
\end{itemize}
the Commission filed six WTO complaints resulting from TBR investigations, comparable to the number of complaints filed under U.S. Section 301 in an active year. Through December 1999, the EC had already settled three TBR complaints without having to litigate them before a WTO panel. By June 2001, four more complaints had been settled, one of them (involving Chile’s treatment of EC fishing vessels) on the day before a WTO panel was to be formed. The Commission has drafted amendments to the TBR that (if adopted) would extend TBR’s coverage to complaints under EC bilateral agreements, which increasingly include binding dispute settlement. In short, the

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

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

301 See Le Reglement sur les Obstacles au Commerce, 203 ECONOMIE: LES ECHANGES 1, 10-11 (March 16-23, 2001) (on file with author) (noting in particular the settlements with Brazil on its licensing practices for steel and its recognition of a “geographical right of origin for French cognac”– although Brazil still recognizes the Brazilian variety under a similar name). Jean Charles Van Eeckhaute, while an official in the TBR unit, similarly reported in 1999 that “mutually agreeable solutions are currently being finalised in Korea- Imports of Cosmetic Products, Brazil- Import Regime for Textile Products and Brazil- Cognac Appellation of Origin,” and that “discussions are under way in Chile- Transhipment of Swordfish and will soon start in Brazil- Import Regime for Sobitol and CMC.” Van Eeckhaute, Private Complaints against Unfair Trade Practices, supra note , at 210. The EC nonetheless subsequently requested the formation of a WTO panel in the Chilean swordfish case. See EU Requests Swordfish Panel Against Chile, 9 BRIDGES (Nov.-Dec. 2000), published by the International Centre for Trade and Sustainable Development. Yet, the EC settled the case the day before the panel was to be formed. Interview with Commission official in TBR unit, Brussels in (June 13, 2001).

302 The Commission proposed such a revision as part of the Amsterdam Treaty, but has since shelved the proposal. Stewart 2002 Interview, supra note... As for the number of bilateral agreements signed by the EC, or in the process of negotiation, see supra note...
differences between TBR and Section 301 have become more formal than substantive.

C. EC Trade Claims in Action: Use of the Article 133 and TBR Tracks To Date. EC enterprises face a maze of national and EC supranational councils, committees, directorates-general, directorates, units and sectoral and country desks when they ask public officials to act on their behalf. EC enterprises typically rely on someone within the European Commission, possibly in conjunction with a national authority, to guide them through the maze, and thus rely less on private counsel than in the United States.303

There are certain aspects of the TBR procedure vis-a-vis the Article 133 process that firms may prefer. First, the different voting rules under the TBR can enhance the leverage of Commission-business partnerships vis-a-vis EC member states. Under the TBR, the Commission’s decision to file a WTO complaint can only be overturned by a qualified majority vote of the Council,304 whereas a Commission proposal under Article 133 requires qualified majority approval. These rules render member states’ ability to veto a Commission TBR proposal extremely difficult. Firms thus may bring a TBR complaint where they feel that an Article 133 procedure might be blocked. For example, the German company Dornier Luftfahrt had been unsuccessful in obtaining the Article 133 committee’s authorization for the Commission to initiate a WTO complaint against Brazilian subsidies to one of its competitors. EC suppliers to the Brazilian company located in other member states indirectly benefitted from these subsidies and thus lobbied their member states to oppose any EC action. These

303 See Marco Bronckers & Natalie McNeils, The EU Trade Barriers Regulation Comes to Age, 35 J. OF WORLD TRADE 427, 460-461 (2001). Unlike the Washington, D.C. trade bar, the Brussels trade bar has played a less active role in assisting firms to challenge foreign trade barriers, although outside legal counsel has played a more active role in the EC in recent years. See supra note.... The explanation for these differences are assessed in Part III below.

304 See TBR articles 13.2 and 14. However, where the EC brings a case before the WTO and the WTO member in question fails to comply with a WTO ruling against it and the Commission is authorized by the WTO Dispute Settlement Body to implement retaliatory measures, then such latter decision to implement such measures is subject to a decision by the Council by a qualified majority vote, in accordance with article 133 of the Treaty. See TBR article 13.3. The Commission is generally required to keep the article 133 Committee abreast of developments in TBR procedures in order for it to “consider any wider implications for the common commercial policy.” See TBR article 7.2.
member states, however, were unable to block the initiation of a TBR investigation.\footnote{See Van Eeckhaute, \textit{Private Complaints against Foreign Unfair Trade Practices}, supra note\ldots at 211; and Marco Bronckers & Natalie McNeils, \textit{The EU Trade Barriers Regulation Comes to Age}, 35 J. OF WORLD TRADE 427, 457 (2001). \textit{See also supra note\ldots (concerning the EC’s filing of a third party submission in the WTO case brought by Canada).}}

Because of their reduced leverage and because of TBR’s technical nature, member states tend to assign lower-ranked officials to the TBR committee (the Article 133 Committee’s counterpart for TBR matters).\footnote{Interview with member state representative to the Article 133 committee in Brussels (June 23, 1999).} Member state representatives find TBR committee work less exciting than Article 133 Committee work because it involves fact-intensive litigation files on proposed WTO claims, sometimes of relatively little economic impact. For them, the files comprise too many facts, too much law, and not enough policy or diplomacy. This is a province for lawyers, not the high politics of diplomatic encounter. In consequence, the Commission and private complainants are granted considerable discretion to develop TBR cases and determine negotiation and litigation strategies. Even though the Article 133 process typically works fluidly, the more Commission-friendly rules and procedures under the TBR can, in some cases, influence a firm’s expectations and behavior.

Second, TBR may offer some advantages to smaller enterprises or large firms with relatively less important commercial claims. One of the goals of the EC’s Market Access Strategy is to provide smaller businesses who lack established contacts with better access to Commission officials.\footnote{The Commission’s market access unit developed its database so that it could be in contact through the Internet with small and medium-sized businesses. 1998 Prince Interview \textit{supra note\ldots}.} This is a more important issue in Europe than in the United States because small and medium-sized enterprises constitute a much larger percentage of Europe’s gross domestic product than they do in the United States.\footnote{Regarding the importance of small and medium-sized enterprises (SMEs), “we must remember that more than 95% of enterprises are SMEs. Over 90% of European enterprises are micro enterprises with fewer than 10 employees. SMEs employ 66% of the workforce in private sector. SME’s are not an exception; they are the rule.” Remarks of Erkki Liikanen [Member of the European Commission for Enterprise and Information Society], \textit{Economic Policy and Enterprise Culture} (Oct. 14 1999) at a conference organized by UNICE (Union of Industrial and Employer’s Confederation of Europe, the peak organization in the EU representing employers), available in <http://www.europa.eu.int/rapid/start>. The importance of SME exports was confirmed by Dorian Prince, former head of the Market Access Unit, Prince 1999 Interview, \textit{supra note\ldots}.} TBR grants these enterprises the legal right to have the European Commission investigate an issue on their behalf, provide them with all non-confidential information available,
conduct a hearing at which arguments may be presented, and publish the relevant decision in the EC’s *Official Journal*. TBR also prescribes a timetable for the investigation, so that the enterprise will be certain that a decision is made within a relatively certain time period.

Because the TBR unit of the Commission is less subject to member state constraints, it is less likely to balance a small enterprise’s problems against other member state political interests. Claims thus can proceed under the TBR when they otherwise might lack member state support. Leather tanners, silk fabric finishers, and producers of Parma ham, for example, are not politically powerful industries. Moreover, they are predominantly small family-owned enterprises located in northern Italy, where they lack close contacts with Italian officials in Rome. The TBR

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

310 Commission officials state that the procedure generally takes 6 to 7 months. Interview with Commission official in the TBR unit, Brussels, June 29, 1999. However, in practice it can take longer. See Marco Bronckers & Natalie McNeils, *The EU Trade Barriers Regulation Comes to Age*, 35 J. OF WORLD TRADE 427, 446 (2001) “Unfortunately, the deliberations of the Commission and the Member States following the conclusion of the internal examination are not subject to any time-limit,” such that “cases routinely take far longer”.

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

312 See *supra* note...

313 In the Italian silk case, 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, but they nonetheless were able to successfully use the TBR procedure. 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. Telephone interview with a member of TBR Unit (February 1998).

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

315 This point was made by Dorian Prince, former head of the Market Access Unit. Prince 1999 Interview, *supra* note...
has increased the likelihood that EC officials will seriously address their trading problems, and they have correspondingly benefitted.\textsuperscript{316} Business associations generally maintain that the TBR unit is more responsive to their trade concerns than members of the Article 133 Committee and other divisions within the Commission.\textsuperscript{317}

Third, Commission-business partnerships may use the more transparent TBR procedure as a tool to increase pressure on foreign governments without commencing a formal WTO complaint. As the TBR scores initial successes and becomes better known, the Commission believes that the bringing of a TBR complaint can pressure foreign governments, especially less powerful ones, to negotiate and modify practices.\textsuperscript{318} The Commission attempts to use the TBR procedure to notify foreign governments more forcefully that if they do not implement WTO requirements, a WTO complaint will follow.\textsuperscript{319} The TBR report serves as a shadow WTO complaint and an incentive for settlement without invoking formal WTO legal procedures.

The Commission, working with private industry, deploys the TBR more as a “problem-solving device” than a means to litigate outcomes.\textsuperscript{320} A Commission official in the TBR unit calls the TBR “an instrument of suasion,” noting changes made in Korean and Brazilian customs administration practices in response to TBR investigations and negotiations in their shadow.\textsuperscript{321} He points how the European Federation of Shipbuilders brought a TBR complaint against Korean

\textsuperscript{316} To give another example, the TBR claim against provisions of U.S. copyright law brought by the Irish Music Rights Organization involved not only a relatively minor amount of royalties, but also an organization based on the periphery of the EC. IMRO, however, was supported by copyright interests throughout the EC. The Commission took into account the “unanimous support given by the General Assembly of Gesac [Groupement Europeen des Societes d'Auteurs et Compositeurs] to IMRO’s complaint.” Notice of initiation, OJ C177/5 of 11.6.1997.

\textsuperscript{317} Telephone interview with Mr.Tettamanti of FEDERTESSILE (Feb. 19, 1998).

\textsuperscript{318} Over time, the Commission and private firms have learned how to use the TBR more tactically to pressure foreign governments. Interview with Petros Sourmelis, official in the TBR unit, Brussels, June 13, 2001.

\textsuperscript{319} In some cases, a TBR investigation will be commenced merely because the Commission wishes to put the third country on notice.

\textsuperscript{320} Interview with Commission official in the TBR unit in Brussels (June 13, 2001). See also Marco Bronckers & Natalie McNeils, The EU Trade Barriers Regulation Comes to Age, 35 J. Of World Trade 427, 453 (2001) (“European industry is advised, first and foremost, to use the TBR as a means to persuade the EU’s trading partners to settle disputes quickly and amicably.”).

\textsuperscript{321} Interview with Commission official in the TBR unit in Brussels (June 13, 2001).
shipbuilding subsidies in the hope of negotiating a reduction in their amount, as opposed to a full-blown WTO litigation.\textsuperscript{322} Similarly, Volkswagen brought a TBR complaint concerning alleged tax discriminatory practices in Colombia in the hope of exercising more “leverage” in negotiating a reduction of the tax.\textsuperscript{323} TBR can also be used to monitor foreign actions. IFPI, an international association of sound recording companies, continues to monitor Thailand’s enforcement of copyrights in conjunction with the TBR unit’s administration of a complaint originally filed in 1991.\textsuperscript{324} From a practical perspective, the association and Commission use the TBR process as leverage to retain pressure on Thailand to crack down on copyright infringers, under threat that a WTO complaint could follow.

Most businesses, especially larger ones, nonetheless have continued to prefer the Article 133 process for a number of reasons. The Article 133 procedure can avoid the delay of a TBR procedure, which takes approximately six or seven months. It also avoids disclosing arguments to foreign governments, so that they have less time to prepare a defense in a WTO proceeding. Perhaps most importantly, it permits businesses to remain more anonymous, with Commission representatives negotiating the removal of foreign barriers on their behalf.\textsuperscript{325} The TBR, in this sense, can be viewed as a formalization of effective public-private partnerships that operate less transparently within the Article 133 process.

Overall, large multinational businesses and those that are members of national or EC trade associations with offices in Brussels are best positioned to work the system, whether under Article 133 or the TBR. The Scotch Whisky Association, whose members comprise a major UK export sector,\textsuperscript{326} is renowned for successfully working with the Commission to pry open foreign markets.

\textsuperscript{322} This is an extremely sensitive areas since the EC also subsidizes its shipping industry. Interview with Commission official in the TBR unit in Brussels (June 13, 2001).

\textsuperscript{323} Interview with Commission official in the TBR unit in Brussels (June 13, 2001).

\textsuperscript{324} See supra note____.

\textsuperscript{325} Although trade associations can file a TBR complaint, in which case the name of an individual firm will not appear, individual firms nonetheless may be perceived as taking more proactive roles.

\textsuperscript{326} According to Dorian Prince, former head of the Market Access Unit, scotch whisky has been the UK’s top export earner. 1999 Prince Interview, supra note____. The head of the Scotch Whisky Association, Tim Jackson, at a conference in Geneva in June 1997 stated that scotch whisky was “among top 5 export sectors with annual exports
The industry’s initial success in the 1996 Japan-Alcoholic Beverages case, concerning alleged tax discrimination in favor of Japanese producers,\(^{327}\) spurred it to work with the Commission in the EC’s successful WTO complaints against South Korean and Chilean tax practices in 1997.\(^{328}\) A sophisticated repeat player, the Scotch Whisky Association likewise worked with the Commission on China’s terms of accession into the WTO.\(^{329}\)

Although TBR’s procedures can favor smaller enterprises, some trade associations have been relatively active users of the instrument. EUROFER, which represents EC steel producers, initiated two of the TBR’s first thirteen matters.\(^{330}\) Two other TBR complaints were brought by members of the EC textile association.\(^{331}\) A seventh TBR matter was brought by the national association of

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\(^{327}\) In the EC’s case against Japan, after the WTO Appellate Body found Japanese sales taxes to be discriminatory in violation of WTO rules, Japan agreed to change its regulations. The Appellate Body decision can be found at Japan—Taxes on Alcoholic Beverages, Report of the Appellate Body, 4 Oct. 1996, <http://www.wto.org>.

\(^{328}\) The EC first brought a complaint under GATT Article II.2 against Korea’s tax discrimination in favor of the alcoholic beverage *soju* in April 9, 1997. The Appellate Body found in favor of the EC’s claim, which was adopted by the WTO Dispute Settlement Body on February 17, 1999. *See Overview of the State of Play of WTO Disputes* (as of August 31, 2001) (on file with author). The EC also brought a complaint against Chile’s alleged discriminatory taxation of imported spirits on June 4, 1997. After Chile modified its internal tax regime, the EC brought a new complaint on Dec. 15, 1997, alleging that the modified law was still discriminatory in violation of Article III(2) of GATT 1994. The Appellate Body found against Chile, which report was adopted by the WTO Dispute Settlement Body on January 12, 2000. *See Overview of the State of Play of WTO Disputes* (as of August 31, 2001) (on file with author). Chile agreed to lower its taxes on distilled spirits to the same level that it charges for its domestic liquor known as *pisco*. *See* Rosella Brevetti, *Chile Modifies Distilled Spirits Taxes to Comply with Adverse WTO Ruling*, 18 INT’L TRADE REP. (BNA) 204-205 (Feb. 1, 2001).

\(^{329}\) *See* SWA May 1997 Remarks, *supra* note__.

\(^{330}\) As regards the two matters involving steel, one was brought against the United States, with the claim that its 1916 Antidumping Act is in contravention of the WTO Understanding on the application of antidumping measures, and the other against Brazil in respect of its import-licensing system.

As noted above, the Commission has played a central role in most TBR cases. COTANCE, which represents hundreds of small leather tanners, did not initiate these complaints on its own. EUROFER, responsible for two TBR complaints, was initially set up by the Commission’s initiative, not independently by steel companies. *See* J.P. Hayes, *Making Trade Policy in the European Community* 140 (1993).

\(^{331}\) One was brought by the aforementioned Italian silk federation concerning U.S. rules of origin, and another by FEBELTEX, the federation of Belgian textile producers, concerning Brazil’s import-licensing system. *See* *supra* note__...
cognac producers, the French branch of the Confederation of European Producers of Spirits (CEPS) that benefitted from the EC’s successful challenges against Japanese, Korean and Chilean tax practices.

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

IV. Explaining the Differences in U.S.-EC Public-Private Partnerships: Why a More Aggressive U.S. Approach?

The relative effectiveness of U.S. and EC market access strategies are converging, but the manner in which they are applied continue to reflect differing U.S. and EC approaches. Generally, the United States acts much more confrontational toward third country barriers to U.S. private

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332 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’origin”, 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). See Marco Bronckers & Natalie McNeils, *The EU Trade Barriers Regulation Comes to Age*, 35 J. OF WORLD TRADE 427, 471-472 (2001) (providing overview of case).
interests.\textsuperscript{333} Even where U.S. and EC methods are analogous, their implementation can significantly differ. To recall just one example, the public nature of the database compiled by the EC’s market access unit recalls the United States’ use of the “Super 301” and “Special 301” compilations of “priority” foreign trade practices. The EC database, however, is not accompanied by the build-up and litigation threats that have surrounded the publication of the “Super 301” and “Special 301” lists. Rather, the EC retains the database for internal investigative purposes before approaching a foreign government concerning a barrier’s removal.\textsuperscript{334}

The more aggressive deployment of U.S. market access strategy reflects the more aggressive role of U.S. private interests in trade policy. This section addresses the historical, political, economic and cultural reasons for the more proactive role of business within the United States in international trade disputes. These differences are broken down into the following four categories:

(i) \textit{Political Structure}. The U.S. political process is characterized by a more active role of Congress, which exhorts the USTR to support specific industry and company interests. The EC political process, in contrast, urges relatively more caution in challenging foreign trade barriers, especially where a challenge may implicate conflicting member state interests. Businesses respond to these divergent political opportunities;

(ii) \textit{Role and Structure of Lobbying}. U.S. private firms are more comfortable and experienced with lobbying at the federal level, especially as regards external trade matters. This is due not only

\textsuperscript{333} \textit{See e.g.} Richard Steinberg, “The Prospects for Partnership: Overcoming Obstacles to Transatlantic Trade Policy Cooperation in Europe,” \textit{Partners or Competitors: The Prospects for U.S.-European Cooperation on Asian Trade}, eds. Richard Steinberg and Bruce Stokes 218 (1999) (noting “...The European Commission usually opts instead for a less confrontational approach in negotiations with third countries. For example, instead of publicly threatening retaliation through tariff increases, the Commission may quietly hint at proposals for directives or decisions that would have market-closing effects. Or the Commission may offer the third country greater market access in Europe, or technical aid, in exchange for concessions.”).

\textsuperscript{334} While the Commission notifies the foreign government before adding a 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, where appropriate, reference to the EC’s Member State representatives. The market access unit’s ongoing compilation of trade barriers more closely resembles the U.S. Department of Commerce’s “Market Access and Compliance” service (see http://www.mac.doc.gov). \textit{See supra} note... Similarly, although the EC issues an annual report on U.S. trade barriers, it does not attempt to use the report as a lever to force open the U.S. market. Unlike the U.S. reports, the EC’s report on U.S. trade barriers is not published with fanfare on a set date at which time new WTO complaints are announced. The primary reason for the EC report is to subject the United States to the United States’ own tactics and to maintain a record for leverage in bilateral discussions. Interview with Commission official at U.S. desk in Trade DG in Brussels (June 25, 1999). Confirmed in Stewart 2002 Interview, \textit{supra} note..
to the more conducive U.S. political system, but also to the more unified U.S. market structure, complemented by the United States’ longer historical legacy. The EC still faces considerable hurdles to create a truly single European market;

(iii) Use of Lawyers and Adversarial Litigation. U.S. private firms are more likely to employ private law firms to work with trade officials in international trade litigation, which is a reflection of the United States’ “adversarial legalist” traditions and U.S. firms’ greater distrust of government. EC firms, in contrast, tend to be more wary of litigation;

(iv) Administrative Culture. U.S. trade officials tend to be more responsive to private lobbying on account of U.S. political-cultural expectations, which, in turn, are nurtured and facilitated by Washington’s “revolving door” administrative culture. EC trade officials, in contrast, tend to pursue a career in civil service in Brussels, leading to relatively greater autonomy. They work in an administrative culture that attempts to allay national concerns over favoritism toward firms from rival EC member states.

A. Impact of Political Structures: Congressional Pressures and Member State Conflicts. Perhaps most importantly for explaining the differences in how U.S. and EC public-private partnerships operate, U.S. and EC political processes work in opposite directions toward the establishment of public-private collaborations in litigating WTO claims. The U.S. political process exhorts the USTR to support specific industry and company interests whereas the EC process urges caution. Through the U.S. political process, U.S. firms maintain greater leverage over U.S. trade policy. U.S. firms, together with their executives and large shareholders, help finance congressional and presidential political campaigns. Members of the House of Representatives, representing small districts often dependent on company-specific or industry-specific employment, can be particularly subject to individual firm pressure.335 Their two-year terms subject them to almost constant campaigning. Congress created the USTR to be responsive to private interests and to be subject to

335 Members of the U.S. Congress are freer to “behave like local representatives rather than members of a national organization bearing collective responsibility for government.” Politics Brief, THE ECONOMIST, July 24, 1999, at 51.
Congressional “watchdog” committees. These committees call the USTR before them to testify and explain its actions. If unsatisfied with USTR policy, Congress retains the power to initiate and pass legislation forcing the USTR to act, on the one hand, and withhold granting trade negotiating authority, on the other. As Clyde Wilcox states, “If political scientists were charged to design a national legislature to maximize interest group influence, they would be hard pressed to improve on the American Congress.” As Loomis and Cigler confirm, the United States’ decentralized political power structure and its less-unified political parties help explain the enhanced role of interest groups in U.S. politics.

The European political process, on the contrary, can slow the development of close Commission-private sector partnerships in trade litigation. First, there is much less parliamentary pressure on European trade officials to act on behalf of specific constituent industries. At the EC level, the European Parliament so far has little power over external trade matters and is only consulted on trade policy by the European Commission and Council, pursuant to an informal procedure. As for the member states, European executive branches largely control trade policy,

336 These are the trade subcommittees of the Senate Finance Committee and the House Ways and Means Committee.
337 Congress’ last grant of “fast-track” trade negotiating authority to the executive expired in 1994. See supra note__.
338 Clyde Wilcox, The Dynamics of Lobbying the Hill, in THE INTEREST GROUP CONNECTION, supra note..., at 89 (noting the “many points of access to the U.S. Congress” and the “incentives to listen to interest groups”). See also CANDIDO TOMAS GARCIA MOLYNEUX, DOMESTIC STRUCTURES AND INTERNATIONAL TRADE: THE UNFAIR TRADE INSTRUMENTS OF THE UNITED STATES AND EUROPEAN UNION 60 (2001) (“Among the developed nations, the United States is unique due to the fact that the legislature plays a major role in the development and enunciation of international trade policy.”).
339 See Burdett Loomis & Allan Cigler, Introduction: The Changing Nature of Interest Group Politics, in INTERGROUP POLITICS 5-6 (5th ed. 1998) (noting U.S. constitutional guarantees of free speech and association, decentralized political power structure, less-unified political parties, and American cultural values as explanations for enhanced role of interest groups).
340 Although the role of the European Parliament in EC politics is generally increasing, and although the Commission increasingly consults with the European Parliament on trade policy, the European Parliament has no constitutional or legal power over trade policy under the EC Treaty. The European Commission and Council merely have agreed to consult with it under the Luns-Westerterp and other informal procedures. See CANDIDO TOMAS GARCIA MOLYNEUX, DOMESTIC STRUCTURES AND INTERNATIONAL TRADE: THE UNFAIR TRADE INSTRUMENTS OF THE UNITED STATES AND EUROPEAN UNION 208-210 (2001) (“formally... the European Parliament plays a very limited role... although it has] developed informal procedures to allow it to keep a dialogue on trade matters with the other Community institutions”); and Stephen Woolcock, European Trade Policy: Global Pressures and Domestic
and are not subject to parliamentary pressure. Under member state parliamentary systems, parliamentarians tend to vote on a party line or risk a vote of no-confidence leading to a new election, putting their seats at risk. When they are elected through a list system, they are even less subject to local company pressure.\(^{341}\) Thus, member state executive departments are better able to balance competing constituent interests on a nation-wide basis.\(^{342}\)

Second, the European Commission must balance not only sectoral interests (as the USTR), but also national ones—those of the fifteen member states.\(^{343}\) If a Commission unit becomes too close to a private commercial interest, it may be challenged by EC member states with competing commercial interests. As Greenwood writes, “the Commission’s preferred strategy is to seek principal forms of dialogue from [Euro groups].”\(^{344}\) The mantra of Commission officials thus is to serve the “Community interest” or “public interest,” not a specific interest of a specific firm from

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\(^{341}\) Parliamentarians in Europe are less subject to local company pressure when they are elected through a list system. Moreover, if they vote against the government in a no-confidence vote, this would trigger new elections in which the parliamentarian could lose his or her seat. See Youri Devuyst, *The European Union's Constitutional Order? Between Community Method and Ad Hoc Compromise*, 18 BERKELEY J. INT'L L. 1,40 (2000). See also *Politics Brief*, THE ECONOMIST, July 24, 1999, at 51 (a negative vote under a European Parliamentary system brings down the government in power, so that “members of Parliament must toe a party line.”).

\(^{342}\) In addition, the lead member state executive agency, in many member states, remains the foreign affairs ministry, an agency that more likely favors general foreign policy concerns over specific company commercial interests.

\(^{343}\) This may be one reason that Cowles finds that Europe is more likely to take a “package approach” to trade negotiations as opposed to a sectoral one, “an approach she finds “is frustrating at times to European business.” Cowles, *Private Firms and US-EU Policy-Making*, supra note __, at 242. See generally SIMON HIX, *THE POLITICAL SYSTEM OF THE EUROPEAN UNION* 202 (1999) (referring to the EC policy process as a “consociational model of interest intermediation... divided along cultural rather than socioeconomic lines: into the different nation-states of western Europe”).

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


Interview with DG Trade official in Brussels (June 22, 1999).

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

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

See discussion of the Court of Justice’s Opinion 1/94, supra note _____.
bringing a WTO action. In contrast, the more conducive U.S. political process facilitates a relatively greater role for private interests in U.S. public-private trade networks. U.S. and EC firms may be equally self-interested, but the U.S. political structure opens up avenues for private interests concerning trade policy that are relatively less available for EC firms.

B. Role and Structure of Lobbying. In the context of such divergent political structures, U.S. firms and trade associations more habitually and aggressively lobby trade officials in Washington to challenge foreign trade barriers than do their EC counterparts in Brussels. Part of the explanation is not only structural. It is also historical, reflecting the longer historical record of the U.S. political and market systems compared to the EC’s. The United States has had a single market and Washington D.C. has been a center for legislative and agency lobbying long before the European Community existed. Many European firms continue to work more with national officials than EC officials on matters involving foreign economic relations.

The majority of European firms remain relatively nation-based and, although the situation is changing, many continue to primarily look to their national representatives to defend their interests. Many larger European firms traditionally had close relationships with national governmental representatives because they actually were owned by the state or in other cases (as in

351 The complaint involved U.S. trademark legislation. Baccardi owned the trademark “Havana Club” prior to its confiscation following the Cuban revolution. The French firm Pinot-Ricard, the trademark’s current owner worldwide, cannot register it in the United States because of U.S. legislation recognizing Baccardi’s earlier rights. Pinot-Ricard asked the French representative and the Commission to obtain approval from the Article 133 Committee to challenge the U.S. legislation before the WTO as a violation of the TRIPs Agreement. The Commission, however, could not commence WTO consultations for months because Italy blocked the initiation of any WTO action. Although Italy finally authorized the Commission to commence formal WTO consultations, the Commission still had to obtain unanimous member state approval before requesting the formation of a WTO panel, resulting in further delay and uncertainty. Some member states feared that the United States was offering special favors to Italy to impede EC action, such as agreeing to target non-Italian exports in the United States’ retaliation against the EC’s WTO-illegal banana regime. Interview with member of the Article 133 committee (June 23, 1999, Brussels). See also Larry Speer, Battle over Cuban Rum Trademark New Threat to EU-U.S. Relations, 17 INT’L TRADE REP. 269 (Feb. 17, 2000); EU Member States Split on Approval for WTO Panel on Section 211, 18 INSIDE U.S. TRADE 1, March 10, 2000. Eventually, however, the EC brought the case and prevailed over certain claims, including claims that the U.S. law violated national treatment and most-favored nation obligations, and that trade names are covered by the TRIPs Agreement. See WTO Appellate Body Reverses Part of Panel Ruling in Havana Club Dispute, 19 INT’L TRADE REP (BNA) 50 (Jan. 10, 2002).
France), were considered to be “national champions.”

Even where these firms are members of Brussels-based lobbying associations, their first governmental contact may remain their national representative. For example, in the steel industry, Corus (the entity resulting from the merger of British Steel with the Dutch company Hoogovens) retains close relations with the British government, and Arcelor (the entity resulting from the merger of French Usinor Sacilor and companies from Spain and Luxembourg) with the French government. In many cases, these contacts remain more important than those of the European steel trade association, Eurofer, with the European Commission. As a result, the EC often must balance the interests of competing national industrial interests working through competing national representatives. For example, in the automobile sector, the EC must balance the interests of German car companies that invest and sell to a greater extent in foreign markets than other European car companies, resulting in national splits within the Article 133 Committee as to whether a trade complaint should be initiated.

Moreover, small and medium-sized enterprises are responsible for a much larger percentage of Europe’s production than the United States’, and they less likely have close contacts in Brussels. For these firms, lobbying in Brussels is more remote, and often involves dealing with officials speaking a non-native language and having non-native manners and perspectives, thus offering a less obvious payback. As scholars have noted, “business associations are more likely to have differentiated territorial structures, the more their members are small rather than large firms, and serve local and regional markets rather than national/international markets.”

Moreover, much EC

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354 This was apparent in the EC’s challenges to Brazil’s practices in the automobile sector. Action was delayed because of splits among the interests of German versus other European car industries. Interview with ACEA European automobile trade association, June 29, 1999 and Commission official from Legal Services division, Brussels, June 24 1999. A split between automakers from different member states also occurred in respect to complaints about the Canadian auto market. Interview with Commission official, Brussels, June 21, 1999. U.S. auto industry interests are less likely to diverge. As regards the automobile parts sector, see PARTNERS OR COMPETITORS: THE PROSPECTS FOR U.S.-EUROPEAN COOPERATION ON ASIAN TRADE, eds. Richard Steinberg and Bruce Stokes 218 (1999) (noting “the absence of pan-European trade association representing the automobile parts industry).

legislation takes the form of “framework directives” that may leave significant discretion for member state implementation.\(^{356}\) The directive form of legislation has no counterpart in the United States. Those EC firms and industries whose activities remain centered within a single member state often continue to predominantly contact national representatives on regulatory matters despite the growth in EC-initiated legislation.\(^{357}\) Historically, the first EC-wide enterprises were often subsidiaries of American multinationals, not European firms.\(^{358}\) As a consequence, even in Brussels, multinational U.S. firms remain on the lobbying forefront.\(^{359}\)

In addition to market structural explanations, individual European firms have been less aggressive lobbyists at the European level because of the more centralized and corporatist traditions of most member states. In corporatist systems in Germany and Scandinavia, firm interests typically are aggregated into peak organizations which negotiate alongside state and labor representatives on matters of mutual concern to reach a consensus.\(^{360}\) In centralized systems as in France, the state


\(^{357}\) See Coen, \textit{The Evolution of the Large Firm as a Political Actor in the European Union}, supra note\, at 93 (stating that “a system of national representation favoring inertia made it illogical for firms to change existing patterns of behavior”).

\(^{358}\) “The most effective lobbying force in town [Brussels] is commonly considered to be the EU Committee of the American Chamber of Commerce.” \textit{The Brussels lobbyist}, supra note\, at 42. The EU Committee of AmCham represents American multinational in the EC. See Maria Green Cowles, \textit{The EU Committee of AmCham: The Powerful Voice of American firms in Brussels}, 3 J. EUR. PUB. POL’Y 339 (1996). One member state official that attended Article 133 committee meetings maintained that he received “more calls from U.S. industry than from EU industry.” Interview, Brussels, June 23, 1999.

\(^{359}\) \textit{Id.}

\(^{360}\) Philippe Schmitter presents classic corporatism as a system where actors “are organised into a limited number of singular, compulsory, non-competitive, hierarchically ordered and functionally differentiated categories.” Philippe C. Schmitter, \textit{Still the century of corporatism?}, REV. OF POL. 85 (1974). This is changing, though not yet to the extent of a U.S. decentralized model of lobbying. For an assessment of different forms of capitalism, see \textit{Governing Capitalist Economies: Performance and Control of Economic Sectors} (J. Rogers Hollingworth et al. eds., 1994). \textit{See also} Peter Katzenstein, \textit{International Relations and Domestic Structures: Foreign Economic Policies of Advanced Industrial States}, 30 INT’L ORG. 14 (1976) (noting the United States is “a country marked by a strong society and a weak state”). The lead representative of the EC automobile trade association, ACEA, confirms that, “in the EC, one is taught to [work] in a spirit of consensus,” which “affects firm behavior.” Interview with ACEA representative, Brussels, June 29, 1999.
through its professional civil service plays a more dominant “top down” role.361 In each case, many firms are more accustomed to working with state public officials through hierarchical confederations that combine trade associations from multiple sectors, such as the BDI in Germany, the MEDEF in France and UNICE in the EC.362 Such centralization helps insulate administrative elites from discrete private demands.363

Even though lobbying in Brussels has become relatively more decentralized, most European firms continue to lobby through “peak” trade associations representing firms throughout Europe on a cross-sectoral or sectoral basis.364 When lobbying is conducted through “peak” associations, individual firm views are diluted or offset by other firms’ countervailing priorities.365 Moreover, where firms’ views and interests are divided along national lines—a legacy of traditionally segregated

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

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

363 See Mark Aspinwall and Justin Greenwood, Conceptualising collective action in the European Union, in COLLECTIVE ACTION IN THE EUROPEAN UNION: INTERESTS AND THE NEW POLITICS OF ASSOCIABILITY 1 (eds. Justin Greenwood and Mark Aspinwall 1998) (“Modern European states... have a tradition of strong political parties or administrative elites, insulating them (at least relative to America) from particularist private demands.”).

364 As Justin Greenwood notes, “There are now over 600 formal European level business associations.... and approximately 250 firms with representatives offices in Brussels.” Justin Greenwood, Organized Business and the European Union, in ORGANIZED BUSINESS AND THE NEW GLOBAL ORDER 77(Justin Greenwood & Henry Jacek, 2000) . Greenwood adds that “some two-thirds of Euro groups are federations of national organizations.” Id. at 96.

365 As Justin Greenwood writes, “In order to arrive at ‘an opinion’, UNICE has to seek to reflect the broad constituency of its members interests and positions, which is in turn very often the result of compromises made at the national level. To help it arrive at common positions, UNICE uses its network of permanent committee structures, which in turn heightens the tendency for compromise. thus, the organization is well recognised for providing generalized, ‘lowest common denominator’ positions which are not always very helpful in providing the institutions with a clear signal to act upon.” Justin Greenwood, Organized Business and the European Union, in ORGANIZED BUSINESS AND THE NEW GLOBAL ORDER 77, 81-82 (Justin Greenwood & Henry Jacek eds., 2000).
European markets—these peak institutions become even less effective for an individual firm on a specific trade matter. These European distinctions are somewhat diminishing, as reflected in the increased role of large multinational European firms. In addition, the Article 133 process continues to offer possibilities for firms and associations that work through national representatives. Nonetheless, individual European enterprises remain relatively less likely to directly lobby and network with the Commission compared to the dynamic in the United States.

Finally, even European firms engaged in relatively active lobbying in Brussels on internal market matters, are less active on external commercial affairs. They are thus less likely to aggressively lobby governmental officials to litigate over foreign trade barriers than their U.S. counterparts. The result is relatively greater discretion for European public authorities. As a

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

368 See, e.g., OSTRY, GOVERNMENTS AND CORPORATIONS, supra note __, at 33 (comparing the political economy of business-government relations in the EC in relation to GATT trade liberalization negotiations with that of internal EC market integration. Ostry states, “The divergence between the role of the major European corporations in the two high policy processes could scarcely be more marked... [T]he multinational corporations— through their new organization the European Roundtable...— played a fundamentally important and leading role in the strategic formulation of the move to the internal market and have continued to do so as it has proceeded”). Confirmed in interview with members of Commission’s Legal Services division, June 22 & 23, 1999.

369 See Maria Green Cowles, Private Firms and US-EU Policy-Making: The Transatlantic Business Dialogue, in EVER CLOSER PARTNERSHIPS: POLICY-MAKING IN US-EU RELATIONS, 229, 241 (Eric Philippart & Pascaline Winand, eds., 2001) (“European business has not formally organized itself in Brussels to lobby Commission officials on trade issues... US industry for example, has direct channels to the Commerce Department and USTR on trade issues through ISACs [Industry Sectoral Advisory Committees], European industry does not.”). See also John Peterson, EUROPE AND AMERICA IN THE 1990'S 124 (1993); and Stephen Woolcock, European Trade Policy: Global Pressures and Domestic Constraints, in POLICY-MAKING IN THE EUROPEAN UNION 373, 380-381 (Helen Wallace & William Wallace eds., 4th ed. 2000) (“Contrary to the situation in the USA, which has a set of formal Trade
Danish representative to Article 133 Committee meetings affirms, “Our firms do not come to us with trade problems. They tend to invest to get around a barrier; they don’t litigate.”

Another member of the Article 133 Committee confirms, “We still tend to see trade policy largely as diplomacy.”

As a lobbyist for the chemical industry’s trade association adds, “We Europeans still see ourselves as negotiators. We are not a litigious people.”

Correspondingly, EC authorities can be more deferential than the United States to developing country interests, such as those of former EC colonies. For example, both the United States and EC brought WTO complaints against India’s use of quotas invoked on balance-of-payments grounds, but the EC settled with India to gradually phase out its quotas within four years, whereas the United States continued to litigate.

U.S. representatives maintain that their European colleagues criticize them for being too aggressive, but then complain when the United States gets a better deal for its firms.

Faced with different historical legacies, the Commission has had to lobby firms to lobby it in order for the Commission to more effectively enforce European trading rights. Although federal agencies in the United States have also sponsored the formation of national interest groups to

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370 Interview, Brussels, June 24, 1999.

371 Interview in Brussels (June 25, 1999). A member of the Commission’s DG Trade confirms that there appears to be a different mentality among U.S. firms, who view a WTO case as “their case,” whereas EC companies tend to view WTO cases as the responsibility of public authorities. Interview, Brussels, June 24, 1999.

372 Interview with Reinhold Quick, lobbyist for CEFIC (the European Chemical Industry Council) in Brussels (June 25, 1999).

373 India continued to limit imports to protect its balance of payments even though it had long had a surplus of currency reserves, as confirmed by representatives from the International Monetary Fund. The United States, however, refused India’s offer to settle the dispute and continued its complaint before the WTO’s dispute settlement body. See Daniel Pruzin, EU Seeks WTO Consultations on India’s Duties, Import Curbs 15 INT’L TRADE REP. (BNA) 1823 (Nov. 4, 1998). Similarly, the United States took a more aggressive stance concerning South Africa’s enforcement of pharmaceutical patent rights than did the EC. Interview with EC trade association on patent matters, Brussels, June 28, 1999.

374 Interview with trade representative, May 17, 1999.
advance federal goals, the Commission feels much more pressed to do so in light of the EC’s historical, economic and political contexts. The U.S. Commerce Department, for example, took the initiative in founding the U.S. Chamber of Commerce in 1911 to advance federal agency goals, but this association has become completely independent of government over time. Similarly, whereas U.S. Section 301 goes back to 1974, the Commission’s TBR procedure was created in only 1995.

The Commission’s trade units are attempting to overcome these contrasting historical legacies. Just as I.M. Destler notes that the forging of public-private links in the United States helped change business behavior and expectations toward the international trading system in the 1970s, so one of the Commission’s central goals with the TBR has been to socialize EC firms to work with the Commission to take more effective offensive action against foreign trade barriers. As stated by Alistair Stewart, former 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.”

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375 On U.S. governmental sponsorship of interest groups generally, see e.g. Burdett Loomis and Allan Cigler, Introduction: The Changing Nature of Interest Group Politics, in INTEREST GROUP POLITICS (5th ed. 1998), at 13-15 (“In the early twentieth century, relevant government officials in the agriculture and commerce departments encouraged the formation of the American Farm Bureau Federation and the U.S. Chamber of Commerce respectively.”). This U.S. agency sponsorship, however, has an older more developed historical legacy. See e.g. Lowi, The End of Liberalism, supra note..., at 79 (noting that at the start of the twentieth century, “[t]he Department of Commerce fostered the trade associations where they already existed and helped organize them where they did not yet exist.”). Nonetheless, still today, the USTR forms sector-specific business advisory councils on trade policy. See e.g. Kenneth Abbott, ‘Economic’ Issues and Political Participation: The Evolving Boundaries of International Federalism, 18 CARDOZO LAW REV. 971 (1996) (discussing organization and roles of U.S. technical, sectoral and functional trade advisory committees). On the role of the U.S. Department of Commerce in the Formation of the Transatlantic Business Dialogue in the early 1990s, see Maria Green Cowles, The Transatlantic Business Dialogue: Transforming the New Transatlantic Dialogue, in TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY 213 (Mark Pollack & Gregory Shaffer, eds., 2001).

376 See Lowi, THE END OF LIBERALISM, supra note..., at 79 (noting that at the start of the twentieth century, “[t]he Department of Commerce... took the initiative in founding the U.S. Chamber of Commerce in 1912. Without official endorsement in 1912, the fusion of local chambers into one national business association would more likely never have taken place. Most of the negotiating sessions among local leaders, the National Association of Manufacturers, and others were arranged by, and took place in, the office of the secretary of Commerce and Labor. The final organization charter was written there.”).

377 As noted earlier, the NCPI was enacted in 1984, but was more constrained and ultimately inefficacious instrument. See supra noted __.


379 Alistair Stewart, Market Access: A European Community Instrument to Break Down Barriers to Trade, vol. 2 INT’L TRADE L. & REG. 121, 123, 125 (1996). The efforts of the Commission to stimulate greater public-private interaction in the EC is not limited to the trade realm. Greenwood also notes the “entrepreneurial role of the
Successful use of TBR, Stewart emphasized, will require “a certain change in attitude in EC companies.”[^380] To develop this reflex, the Commission has held press conferences, distributed glossy brochures, hired consultants, contacted European trade associations to bring claims, and prepared claims for them. The Commission’s TBR unit largely wrote the TBR complaint for the Italian silk industry.[^381] It hired a consultant to identify barriers for the leather industry, leading to TBR cases filed against Argentina and Japan.[^382]

In contrast, larger U.S. firms tend to employ well-staffed governmental affairs departments which track and strategize to shape federal legislation and regulatory policy. In 1997 alone, firms spent over $1.4 billion on lobbying in Washington, dwarfing the amount spent in Brussels.[^383] These firms do not need to work through the intermediary of member state officials who speak their native tongue. They do not defer lobbying to “peak” organizations in Washington.[^384] When they have trade problems, they directly contact the USTR. For them, lobbying is less controversial and more routine, in particular with respect to international trade. As a lobbyist from the U.S. intellectual property industry complains, his European counterparts in business are “less aggressive.” They don’t like to “rock the boat.” A U.S. lobbyist’s business is to stir things up, not smooth things over. “We thrive


[^381]: See supra note __.

[^382]: Interview with the representative of leather trade association COTANCE in Brussels (June 22, 1999). Confirmed in interview with Commission official in Brussels. Prince 1999 Interview, supra note...

[^383]: The $1.42 billion figure was reported by the Center for Responsive Politics, a research group based in Washington D.C. See *Tab for Washington Lobbying: $1.42 Billion*, N. Y. Times, July 29, 1999, at A14. Cf Shaiko, Lobbying in Washington, supra note __, at 15 (“Lobbying expenditures for 1996 totaled roughly $1 billion.”). For a report on lobbying by the U.S. pharmaceutical industry, see e.g., Viveca Novak, *How Drug Companies Operate on the Body Politic*, *Business and Society Review* 58 (winter 1993). See also supra note... and accompanying text concerning the increase in the number of interest groups in Washington over the last decades.

[^384]: U.S. corporations more likely form ad hoc associations to address specific trade barriers– witness the Coalition Against Australian Leather Subsidies. See supra note __.
on confrontation."\textsuperscript{385}

Nonetheless, as Europe integrates, European firms work increasingly closely with the European Commission in Brussels. Lobbying in Brussels, while rapidly expanding, is largely a phenomenon of the last decade, taking off in the clamor toward the single market of “Europe 1992”\textsuperscript{386} and the elimination of national veto rights over most legislative matters.\textsuperscript{387} As more European firms operate on an EC-wide basis, and as they are affected by more legislation enacted in Brussels,\textsuperscript{388} they target more resources on working with EC institutions.\textsuperscript{389} European cross-border

\textsuperscript{385} Telephone interview with U.S. lobbyist over copyright matters (May 17, 1999). Cf interview with Commission official handling copyright matters, Brussels, June 24, 1999 (stating that the Commission’s strategy is “based on cooperation rather than confrontation”).

\textsuperscript{386} See M.P.C.M. Van Schendelen, Introduction: The Relevance of National Public and Private EC Lobbying, in NATIONAL PUBLIC AND PRIVATE EC LOBBYING 1, 6 (M.P.C.M. Van Schendelen ed., 1993) (concerning the publicity given to the Commission’s push for the creation of a “single European market” by 1992, in particular following the 1986 Single European Act). In this effort, 500 legislative measures were passed during a six and a half year period, significantly harmonizing European legislation. See George Berman et al., 1998 SUPPLEMENT TO CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 209 (1998). During this period of heightened EC legislative activity, European firms increasingly followed the legislative process in Brussels. See id.; Coen, The Evolution of the Large Firm as a Political Actor in the European Union, supra note ____, at 95, 99 (concerning “movement towards single-issue groups with a mobile and changing membership” following the Single European Act from the traditional peak European federations, and “trend towards an increasing partnership between firms and the Commission at the European level.”); and David Coen, The European Business Interest and the Nation State: Large-firm Lobbying in the European Union and Member States, 18 JOURNAL OF PUBLIC POLICY 75 (1998). It is reported that, “Of the ten biggest ‘public-affairs consultancies in Brussels, five have arrived since 1990.” The Brussels lobbyist and the struggle for ear-time, ECONOMIST, Aug. 15, 1998, at 42 [hereinafter The Brussels Lobbyist].

\textsuperscript{387} See GREENWOOD, REPRESENTING INTERESTS IN THE EUROPEAN UNION, supra note ___, at 53 (“The SEA [Single European Act], and later the TEU [Treaty of European Union], considerably extended the constitutional reach of the qualified majority system of voting.”).

\textsuperscript{388} Cowles has estimated that around 60 percent of all legislation affecting industry in the EC originated in Brussels. See Justin Greenwood, Organized Business and the European Union, in ORGANIZED BUSINESS AND THE NEW GLOBAL ORDER 77 (Justin Greenwood & Henry Jacek eds., 2000) (citing Cowles).

\textsuperscript{389} See, e.g., Vivien Schmidt, FROM STATE TO MARKET? THE TRANSFORMATION OF FRENCH BUSINESS AND GOVERNMENT 66 (1996) (noting in respect of French business enterprises, “Big businesses in particular now find themselves the privileged interlocutors of the European Union Commission (sic), and partners rather than supplicants of French ministries in the lobbying efforts of the nation”). Schmidt notes how “French government officials who typically frowned on lobbying when it involved the national government, even encouraged it when it involved the EU” Id. at 235. The importance of Brussels as a center for lobbying is confirmed by representatives of larger businesses. See e.g., Caine, Power of Persuasion, supra note ___ (citing Christopher Boyd of Lafarge SA: “In Europe, Brussels is becoming much more important than national capitals in terms of our government affairs work. Most of the laws that affect us start their lives in Brussels.”). See also SIMON HIX, THE POLITICAL SYSTEM OF THE EUROPEAN UNION 167 ff. (1999) (“From an individual firm’s point of view, the rewards from national corporatist bargaining with governmental and labour actors, and even membership of ‘national ‘ peak associations of business, have receded as the benefits of private action have increased.”).
mergers and acquisitions, and the creation of a single European currency, the Euro, accelerate this trend. As the figures on new TBR cases demonstrate, European firms are indeed developing new reflexes and are increasingly going to the Commission with WTO complaints. However, given the EC’s decision-making structure, firms and associations that have developed close contacts with the Commission must continue to work through member state officials as well, especially on matters involving the Article 133 Committee.

C. Use of Private Lawyers and Adversarial Litigation. Having long operated within corporatist and centralized civil law systems (with the United Kingdom as an exception), European companies and trade associations have less frequently employed private lawyers and rather let the Commission’s professional civil servants take the lead on trade matters. Even Eurofer, the European steel association confirms that it “relies on the Commission for legal services.” When bringing offensive claims against foreign trade barriers under the Trade Barrier Regulation, European companies and associations have been less likely to hire lawyers to advance their arguments. For many European companies, this is “the Commission’s job.” The idea of an individual enterprise forcing the government’s hand on international economic matters through a legal procedure remains relatively alien to their traditions.

Lawyers in the Commission’s Legal Service division who bring and defend WTO cases confirm that they do not receive well-prepared complaints from industry, but rather must go to EC

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


392 Interview with representative of Eurofer, Brussels, June 29, 1999. Cf the legal activism of the steel industry in the United States.

393 Confirmed by members of the Commission’s TBR unit in Brussels (June 22, 1999).
firms with requests where they need information. The understaffed Legal Services Division has sometimes hired an outside law firm for assistance, but this law firm worked for the Commission, not a private enterprise. Although European firms now use private counsel more frequently than before, there remains much less work for the Brussels trade bar than its Washington counterpart. Moreover, when European firms hire outside counsel, they often go to Washington law firms, especially in challenges against U.S. trade barriers involving U.S. regulatory measures, such as antidumping and other import relief measures. The Commission, in turn, is much more reticent than USTR in working with firms’ private legal counsel.

EC private input in challenges against foreign trade barriers replicates the situation in

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394 Interview with former Commission official in Legal Services division, Brussels, June 21, 1999. Moreover, where the Commission has gone to both U.S. and European firms for information on a common foreign trade barrier, the U.S. firm has often provided more information. Interview with a member of the TBR unit in Brussels (June 29, 1999) (noting that it can be “hard to get answers from EC companies”).

395 The Commission’s Legal Services Division is currently understaffed. It thus must sometimes hire outside law firms to assist it in WTO cases. These outside firms have sometimes been of U.S. origin. For example, when the EC challenged the United States’ methodology for determining whether a governmental subsidy was passed on following a privatization, the Commission hired the Washington DC firm of Hogan & Hartson to assist it. Interview with Commission official in DG Trade, Brussels, June 24, 1999. Confirmed by Washington trade lawyer, Washington, October 18, 2001. The Commission pays the firms a lump sum, which is significantly less than normal fees. Interview with member of the Commission’s Legal Services Division in Brussels (June 25, 1999). Since the law firms are not paid by private enterprises or trade associations, this does not constitute a public-private partnership in the sense used in this book.

As regards an understaffed Commission more generally, see NEILL NUGENT, THE GOVERNMENT AND POLITICS OF THE EUROPEAN UNION 89 (1994) (calculating a ratio of 0.8 staff in EU institutions per 10,000 European citizens, compared to a staff ratio of 322 per 10,000 citizens at the member state level). Also cited in GREENWOOD, REPRESENTING INTERESTS IN THE EUROPEAN UNION, supra note __, at 34.

396 Interview with member of the Commission’s trade directorate-general in Brussels (June 13, 2001). There are some notable examples of EC lawyer participation. For example, Marco Bronckers, now of the Dutch firm Stibbe, Simont, Monahan, Duhot, was involved in a number of New Commercial Policy Instrument cases. Bronckers represented Akzo in its controversial challenge to U.S. Section 337 of the 1974 Trade Act.

397 Interview with EC trade lobbyist, Brussels, June 25, 1999.

398 For example, Daimler Benz (Mercedes) and BMW hired the Washington firm Hogan & Hartson to assist with the 1994 GATT case U.S.-Corporate Average Fuel Economy. Interview with a former member of the Commission’s Legal Services division in Brussels (June 21, 1999). Similarly, the European shipbuilding industry hired Richard Weiner of Hogan & Hartson’s Brussels-based office to prepare the TBR complaint against Korea’s shipbuilding subsidies. Interview with Commission official in the Trade Directorate-General, Brussels, June 13, 2001.

399 Once EC private attorney who formerly held an internship in the Commission goes so far as to state, “The Commission dislikes the involvement of law firms and specially U.S. law firms. Commission officials prefer much more the cozy contacts between businessmen.” Email message from Candidio Garcia Molyneux, Jan. 7, 2002.
defensive trade cases. Although some European trade associations may have an internal lawyer who helps monitor antidumping claims, the employee tends to be relatively young and inexperienced. Trade lawyers in Brussels lament that they receive fewer antidumping cases from European firms and, even then, cannot demand the fees that Washington firms haul in. European firms tend to clump the purse.

In contrast, in a more adversarial legalist U.S. system, U.S. firms not only budget government affairs departments and retain professional lobbyists to promote their trading interests. They also hire lawyers to ensure that their positions are forcefully advanced in international trade disputes. U.S. companies and trade associations either have relatively less trust in U.S. government officials to represent their interests, or believe that engaging expensive private counsel ultimately will profit them. They engage law firms to assist them in offensive Section 301 complaints (challenging foreign trade barriers) and defensive antidumping and subsidy claims (protecting against foreign imports). Firms hire trade law specialists, often former senior members of the USTR, such as Bob Cassidy at Wilmer Cutler & Pickering, Alan Wolfe at Dewey Ballantine or Warren Maruyama at Hogan & Hartson.

400 Interview with Reinhold Quick, supra note____.

401 Even when bringing defensive anti-dumping claims to protect domestic markets from low-priced imports, European firms often do not hire lawyers. They merely file a petition for antidumping relief or for a TBR investigation with the European Commission–after having already obtained the Commission’s informal support of such filing–and let the Commission do the work. This fact is confirmed by lawyers and government officials in Washington and Brussels. Interview with Brussels lawyer, June 28, 1999. Antidumping law is extremely technical, involving the calculation of preliminary and final antidumping margins, the definition of the relevant product market, and the determination of whether “material injury” criteria are fulfilled.


403 The Washington trade bar is much larger than the Brussels bar, with approximately 2,100 lawyers registered in Washington as trade lawyers. Information obtained from the office of the Washington D.C. Bar International Trade Section and interviews in Brussels, Belgium with members of the private bar, June 28, 1999.
U.S. firms’ greater experience with the enhanced role of private counsel in U.S. domestic litigation may slightly benefit U.S. firms in WTO litigation, at least initially. Under the common law system, adversarial lawyers play a predominant role in the discovery and the presentation of facts before legal and administrative law tribunals. In contrast, in the EC system, which in turn borrows from continental legal systems, especially France’s, reporting judges and advocates general are more central. In addition, U.S. lawyers are accustomed to a more contextualized approach to legal doctrine, pursuant to which legal principles are applied more flexibly to specific factual scenarios. As the WTO system has moved toward a more fact-intensive approach, firms experienced with common law traditions may be slightly advantaged. The fact that British trade associations, such as the Scotch Whisky Association, have been primary beneficiaries of the EC Market Access Strategy supports this view.

D. Administrative Culture: Career Civil Servants and Revolving Doors. Because of U.S.

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404 I thank Colin Picker for highlighting this point. Raj Bhala, *The Myth about Stare Decisis and International Trade Law*, 14 AM. U. INT’L L. REV. 845, 847-49 (1999) (“It [international legal order] is a movement away from the old-fashioned continental-style approach to international dispute resolution and towards the Americanization of adjudicatory mechanisms. The fact that the WTO’s Appellate Body increasingly functions not simply like a court, as distinct from an arbitral tribunal, but like an American court, is one aspect of this more general trend in the global economy of the new millennium”).

405 See discussion in CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW 70-72 (George Bermann et al. eds., 1993). For example, in the application of EC antidumping law, the Commission acts as an “examining magistrate” who predominates the proceedings. *See* Edwin Vermulst, *The Antidumping Systems of Australia, Canada, the EEC and the U.S.A.*, in ANTIDUMPING LAW AND PRACTICE, supra note __, at 430. The EC system is structured so that “the investigating authorities [the Commission] are the only ones with access to the complete file.” Private parties only receive non-confidential summaries that “are generally of limited value,” *id.* at 431.

Lawyers in the EC are also slightly disadvantaged because international trade law has been taught less at law schools in the EC than in the United States. A significant number of lawyers in the Commission and in the Brussels bar that work on international trade matters have studied international trade law in the United States. Those who studied with Professor John Jackson while he was at the University of Michigan Law School commonly refer to themselves as the “Michigan mafia.” The Commission’s legal services division is concerned that the U.S. is correspondingly exercising greater influence in the development of WTO jurisprudence, which is borrowing from such U.S. legal concepts as reasonableness, agency discretion and provisional measures. Interview with Peter Kuyper, former member of Commission’s Legal Services division, in Brussels (June 22 1999).

406 See supra note __.

407 Similarly, it was a British steel company, Corus (formerly British Steel) that hired a Washington DC firm, Steptoe & Johnson, to work with Hogan & Hartson, which in turn had been hired by the EC to assist in the EC’s challenge against U.S. application of its countervailing duty law. Interview in Washington with trade lawyer (Oct. 18, 2001).
traditional distrust of “big government” and corresponding U.S. traditions of lobbying and legal challenges to administrative decision-making. U.S. officials are more accustomed to routinely work with private firms. The career civil servant, for example, is rarer in the “revolving door” arcades of Washington. Lawyers and lobbyists in Washington, enhance their resumes by splashing a few years in public life to subsequently—and lucratively—serve private commercial clients. Senior agency positions in Washington are typically filled by political appointees who often remain for a single four-year term, at most. Many of these USTR and other agency personnel formerly worked for, or are otherwise associated with, industry.

Former USTR representatives populate Washington law firms and trade associations and accumulate far more trade law experience than the new recruits of public agencies.

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408 See, e.g., Jeffrey Epstein, Americans Distrust their Government, 32 FUTURE 12-13 (Oct. 1998) (“Only about a third of Americans say they trust the federal government, and most others believe politicians do not have their interests at heart, according to analysis by the Pew Research Center for People and the Press”).

409 See supra note __.

410 See e.g. Jill Abramson, The Business of Persuasion Thrives in Nation’s Capital, NEW YORK TIMES, at A1 (Sept. 29, 1998) (noting remarks of former USTR Robert Strauss that “lawyers now often went to work for the Government for a few years, not because they wanted a career in public service, but because ‘they know that enables them to move on out in a few years and become associated with a lobbying or law firm and their services are in tremendous demand.’”).

411 As Charles Irish writes, “[I]n February, 2002, David Spooner was appointed the special textile negotiator within the USTR’s office. Mr. Spooner’s background fits the other common profile among government officials working on international trade issues - that of a close association with Congress or a specific industry in the U.S. private sector. Before his appointment as special textile negotiator, Mr. Spooner was an advisor on textile trade issues for House of Representatives member Sue Myrick, a Republican from North Carolina. Not surprisingly, the U.S. textile industry has a significant presence in Representative Myrick’s legislative district and Mr. Spooner’s appointment as special textile negotiator insures that the textile industry has easy access to USTR’s office whenever textiles trade matters arise.” (Excerpt from speech in Bangkok, Thailand, on file with author, May 30, 2002).


Former trade officials from the Department of Commerce do the same. Undersecretary of Commerce for International Trade David Aaron now works for Dorsey & Whitney’s DC office. See Aaron to Leave Commerce Dept. in March for Law Firm, INSIDE U.S. TRADE 15 (Feb. 4, 2000). Former Assistant Secretary of Commerce Franklin Vargo is now Vice President for International Economic Affairs of the National Association of
Charlene Barchefsky and former Deputy USTR Jeffrey Lang are now at Wilmer, Cutler & Pickering. Former USTR Robert Strauss is now a chief lobbyist at Akin Gump. Former USTR officials Alan Holmer and Judith Bello respectively were designated President and Executive Vice President of the pharmaceutical trade association PhRMA. Members of the Washington trade bar typically have worked in government and know how to tailor their presentations accordingly. As one advocate states, to be effective, “you need to think through matters from an official’s standpoint and provide him with arguments he can use.”

Concomitantly, less-experienced attorneys in the USTR Office face lobbyists who are both former high-ranked USTR officials and potential future employers. The pressure to positively respond to requests and suggestions stems not just from a moral calling to serve the “U.S. public interest,” but also, consciously or unconsciously, an economic incentive to prop one’s personal prospects. This revolving door in Washington forges better understanding among public and private representatives. Playing (or desiring to play) both roles enhances each side’s willingness, appreciation and effectiveness in the network.

The USTR, accordingly, more readily supplies firms with information about a trade position or strategy. U.S. lobbyists state that the USTR understands that the USTR’s role is to represent U.S. enterprises’ export interests, or, as one representative bluntly puts it, to “serve us.” U.S. firms complain that Commission officials, on the contrary, are more “condescending” and less helpful than USTR personnel.

As their U.S. counterparts, European civil servants often share class and university-based


413 Telephone interview with Peter Lichtenbaum, Esq. of Steptoe & Johnson (Oct. 30, 2001).

414 One interviewee at USTR said that he had been there for four years (since 1997) and held one of the longer tenures at USTR. He considered himself “an old-timer.” Interview in Washington DC (Oct. 18, 2001).


416 Id. A U.S. lobbyist on intellectual property matters confirms that the U.S. government is much more supportive of his industry than is the European Commission. Interview with representative of U.S. intellectual property association (May 17, 1999). Similarly, a member of the Brussels bar, and former member of the Commission, states that the “Commission can be more snobbish toward firms.” Interview, Brussels, June 28, 1998.
links with business that can facilitate effective public-private networks. However, EC officials tend to have a different perception of their role than their U.S. counterparts, one that has a higher social status than in the United States, and that is better remunerated. The Commission is organized largely on a French continental model of “fonctionnaires,” or public servants, who tend to graduate at the tops of their classes from elite universities and receive greater compensation than their U.S. counterparts. While there may be increasing numbers of exceptions, Commission officials are much more likely to pursue life careers as civil servants. This career structure reinforces the Commission’s relatively greater insulation from lobbying pressures.

Nonetheless, the Commission has attempted to become more responsive to private trading interests, albeit less so than some U.S. firms might prefer. Leading officials within the Commission have realized that the Commission needs to coordinate with firms to effectively represent Europe’s interests in enforcing trade rules. The Market Access Strategy and its Trade Barrier Regulation are tools not only to socialize European firms to work with the Commission, but also to socialize Commission officials to collaborate with firms and thereby mutually develop the reflexes that

417 See, e.g. CANDIDO TOMAS GARCIA MOLYNEUX, DOMESTIC STRUCTURES AND INTERNATIONAL TRADE: THE UNFAIR TRADE INSTRUMENTS OF THE UNITED STATES AND EUROPEAN UNION 153 (2001) (noting “the strong link between the French state and big business” whose leaders are typically top graduates from the same “Grand Ecoles”).

418 Interviews with Commission officials, Brussels, June 21 & 28, 1999 (noting higher salaries, higher status and greater job pleasure if work in the Commission, compared to USTR; stated that feels better to work for the Commission than for some trade association).

419 Although there is some indication that EC civil servants are also moving to private law firms, this is much less common than in the United States. While it is true that Hugo Paemen, former EC chief negotiator during the Uruguay Round and EC Ambassador to the United States, now works for the Washington DC firm Hogan & Hartson, he was forced to leave the Commission because of its mandatory retirement rules once one reaches a set age. Interview with Commission member in Brussels (June 13, 2001). See also, W. John Moore, The Influence Game, NATIONAL JOURNAL 421 (Feb. 5, 2000) (noting not only departure of Paemen, but also that Sir Leon Brittan, former EC Commissioner of the Trade DG, became a consultant to the London-based law firm Herbert Smith). One can, of course, cite examples of former Commission officials who are now trade lawyers in the Brussels trade bar, such as Jacques Bourgeois, working for Akin, Gump, Strauss, Hauer & Feld, and Alastair Sutton, working for White & Case, but these examples are much rarer than in Washington. Interestingly, in both these cases, former Commission officials are working for the Brussels branches of Washington DC-based law firms.

420 As Claude Barfield writes, “Though the EU system recently may have moved slightly in the direction of a more open U.S. style of decisionmaking, the EU trade bureaucracy still operates with much greater power and insulation from private sector pressure than does its U.S. counterpart.” Claude Barfield, The Role of Interest Groups in the Design and Implementation of U.S. Trade Policies, in SOCIAL DIMENSIONS OF U.S. TRADE POLICIES 271 (Alan Deardorff & Robert Stern eds., 2000).
facilitate effective public-private networks.

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

U.S. and European firms and industries often face common barriers to trade, be it in Asia, South America or elsewhere. When they are not litigating against each other, they are often on the same side challenging third country import barriers, such as Indonesia’s former nepotistic “national” car policy, India’s non-recognition of patents, and Japan’s and Korea’s discriminatory taxes on hard alcohol. The United States was a co-complainant or supportive third party in nine of the first ten EC complaints against WTO members (other than the United States) that resulted in panel decisions.\(^{421}\) The EC was a co-complainant or supportive third party in six of the first ten U.S. complaints against WTO members (other than the EC) that resulted in panel decisions.\(^{422}\) This raises the following questions: To what extent have public-private networks for the litigation of trade claims by the United States and EC become transatlantic networks? To what extent has transatlantic cooperation been at the initiative of trade officials or of private parties? To what extent have domestic private parties (from the United States or Europe) assisted foreign trade authorities (in Europe or the United States) to challenge their own domestic regulations?

**A. Limits to Transatlantic Cooperation Between Trade Officials.** U.S. and EC trade officials do not form transatlantic partnerships to cooperate in the bringing of trade claims against common foreign trade barriers to any significant extent. They rarely collaborate in WTO litigation for the following reasons: (i) divergences in national and industry interests in specific contexts; (ii) dissimilar political structures so that interests are articulated and processed differently; (iii) the combative WTO institutional context in which trade officials bargain and litigate, giving rise to hostility; (iv) cultural differences in the deployment of confrontational methods; and (v) the lack of continuity of USTR personnel on account of Washington’s “revolving door” administrative culture.

\(^{421}\) The United States was a co-complainant in five of these cases and a supportive third party in four of them. The term “supportive third party” refers to the case where the United States submits a third party submission in support of an EC complaint.

\(^{422}\) The EC was a co-complainant in five of these cases and a supportive third party in one. The term “supportive third party” refers to the case where the EC submits a third party submission in support of a U.S. complaint.
First, the economic interests of U.S. and EC firms and the United States and EC themselves vary in specific litigation contexts. These interests may converge, but they are never identical. Firms face diverse market challenges and constraints. Richard Steinberg notes, for example, how “European and U.S. automakers each want to further open Japan’s new car market, but they face different barriers to entry and different constraints on what they feel they can demand of Japan.” Where firms invest in a country, they may benefit from a trade barrier and thus ask their government not to challenge it. Specific market contexts affect the relative salience of trade barriers for U.S. and EC firms.

Even where the United States and EC both desire to have a trade barrier removed, they may prefer to “free ride” on the other’s aggressive actions. The more passive party thereby can benefit from enhanced market access while retaining friendlier relations with the foreign country for other purposes, whether to obtain support on a foreign policy issue or a lucrative government procurement contract for a national firm. The United States criticizes the European Community, in particular, for toadying to developing countries that were former colonies in the hope of cornering their markets for other European commercial interests. Alternatively, U.S. and EC officials may strive to aggressively negotiate preferential, as opposed to multilateral, resolutions to trade conflicts, again dissuading collaboration. EC officials, in particular, have challenged allegedly preferential U.S. deals with Japan over semi-conductor chips and auto parts.

When commencing litigation against common trade barriers, U.S. and EC officials often may structure arguments differently so as to protect domestic interests under vulnerable domestic regulatory regimes. For example, in the Japan-Alcoholic Beverages case, the United States and EC

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424 See supra note ___. See also William Drake and Kalypso Nicolaidis, Ideas, Interests and Institutionalization: ‘Trade in Services’ and the Uruguay Round, International Organization 37-100 (winter 1992) (noting “the desire of the EC to be seen by the Brazilians and Indians as a sympathetic player with overlapping interests” in the Uruguay Round negotiations over the GATS).

425 In additions, trade lawyer Richard Cunningham points out, both U.S. and EC officials may obtain “domestic political mileage” when they challenge Japan and Korea. Interview in Washington (Oct. 18, 2001).

426 See Steinberg, The Prospects for Partnership, supra note..., at 216.
transformed their common challenge to Japan’s discriminatory tax system into a U.S.-EC dispute over the legal criteria to be applied. In doing so, they parried over an earlier conflict between them concerning U.S. automotive taxes, since the EC potentially could use the legal interpretation in the case involving Japan for a renewed challenge against an allegedly discriminatory U.S. automobile tax.

In 1994, the EC had instituted a GATT challenge against U.S. anti-pollution taxes on the “corporate average fuel economy” of car fleets. In the case U.S.–Taxes on Corporate Average Fuel Economy (CAFE), a GATT panel upheld the U.S. defense that its taxes were permissible under GATT rules because they were designed with the legitimate aim of combating air pollution, even though the taxes were applied only on European cars.427 In the new Japan-Alcoholic Beverages case, the Europeans again argued that a complainant need only show a discriminatory effect, with the United States retorting that a complainant must also prove a discriminatory intent. The U.S.-EC sideshow irritated the U.S. spirits industry, which only desired the taxes’ removal and was vexed by the additional hurdle of proof proposed by its government.428 U.S. authorities, however, were necessarily concerned about the impact of the Japan-Alcoholic Beverages decision were the EC again to challenge the discriminatory impact of U.S. automobile taxes under the new WTO regime.429

Similarly, although the United States supported the EC’s challenge against an Argentinian safeguard measure on footwear, the United States nonetheless supported Argentina’s argument that the newer WTO Agreement on Safeguards had eliminated a previous GATT requirement that an

427 The U.S. Congress, lobbied by U.S. car manufacturers, had chosen fuel economy thresholds whereby, in practice, only foreign (and particularly European) luxury vehicles would pay the tax. The GATT case was decided during the period that the Agreement Establishing the WTO had been signed but not yet ratified by the U.S. Congress. There is suspicion that the GATT panel’s reasoning may have been influenced by the U.S. domestic political context in which U.S. environmental groups were split as to whether to support U.S. ratification of the Agreement Establishing the WTO.

428 Interview with representative of the U.S. spirits industry trade association, DISCUS (May 19, 1999).

429 The WTO panel and Appellate Body appeared to side with the EC so that the United States both won the Japan-Alcoholic Beverages case (on the merits) and apparently lost it (on the legal reasoning). See Robert Hudec, GATT/WTO Constraints on National Regulation: Requiem for an “Aim and Effects” Test, 32 INT’L LAWYER 619, 629-633 (Fall 1998). However, when the EC was on the defensive against the United State’s challenge of its banana import licensing system, the parties appeared to reverse their positions, with the EC unsuccessfully arguing this time for application of a standard approaching an “aims and effects” test. See Appellate Body Report in Bananas Case, supra note..., paras. 240-242; and discussion in Hudec, Aim and Effects Test Requiem, supra note..., at 641.
import-induced injury be a “result of unforeseen developments.” Because the United States more actively applies safeguard measures against imports, and because the relevant U.S. safeguards statute does not include this requirement, the United States argued that the more detailed 1995 WTO Safeguards Agreement (which was silent on the requirement) superseded the more general language of Article XIX of GATT (which included it). The EC, in contrast, rarely applies its safeguard statute (preferring to use antidumping and countervailing duty measures) and thus argued before the WTO Appellate Body that this additional GATT requirement remains operative.

Second, U.S. and European trade officials work within different institutional settings in which firm interests are articulated and processed. Divergent political pressures from Congress and EC member states can compromise trade officials’ capacity to coordinate common positions. As assessed in part III above, the EC’s more complex trade policy process can dilute the influence of individual firms. Trade officials find it difficult enough to coordinate common positions within U.S. and EC internal interagency (and inter-state) processes, much less than within transgovernmental contexts.

Third, mercantilist rivalry within the WTO institutional context further impedes cooperation against common trade targets. As good mercantilists, trade officials strive to win offensive cases and penetrate foreign markets, while simultaneously defending domestic regulations and protecting domestic industries. Representatives from the U.S. Congress and EC member states press their trade czars to aggressively bring, defend and, above all, win cases against each other. The combative rivalry of “beating” the other side, be it about hormone-raised beef, quotas on banana imports, or trade-related tax policies, constrains collaboration. Former European trade czar Leon Brittan and USTR Charlene Barchefsky allegedly despised each other. Some European officials maintain that

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430 See Raj Bhala & David Gantz, WTO Case Review 2000, 18 ARIZONA J. OF INT’L AND COMPARATIVE L. 1, 73-87 (2001). GATT Article XIX provides, “If, as a result of unforeseen developments and the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligations in whole or in part or to withdraw or modify the concession” (emphasis added). The WTO Agreement on Safeguards, which was adopted “to clarify and reinforce the disciplines” of Article XIX, does not contain any language concerning “unforeseen developments.”

431 Id. Interview with Commission trade official, Brussels, June 22, 1999 (noting lack of safeguard measures in EC).
the EC’s multi-billion dollar challenge against the U.S. tax regime concerning “foreign sales corporations” was in large part Sir Leon’s revenge against U.S. intransigence in negotiating solutions to the WTO bananas and meat hormones cases.432

Officials from antitrust departments, justice departments and other agencies find cooperation easier since, in their work, they confront common problems and rarely must defend domestic regulations against a foreign counterparts’ challenge.433 This is not the case for trade officials. The United States and EC bring more WTO cases against each other than against any other WTO member.434 Score cards are notched. Pressure flares. Scars remain. The members of the USTR office even privately bestow in abstentia an annual award on “the most hated trade negotiator.” The name of the award is the “Mogens Award,” named after Mogens Peter Carl, the head of the EC’s Trade Directorate-General.435

Fourth, U.S. and EC administrative cultures vary widely. European officials often recoil from, and protest against, confrontational unilateralist U.S. trade maneuvers.436 Yet, as a developing country representative relates, both European and U.S. representatives use their market clout to advance U.S. and EC interests. The United States simply is more transparent in doing so. As that representative contends, a U.S. official will unabashedly publicly threaten a developing country and, if the developing country does not comply with the U.S. demand, publicly carry out the threat. In


433 See e.g. Youri Devuyst, Transatlantic Competition Relations, in TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY 127 (Mark Pollack & Gregory Shaffer eds., 2001). (“Transatlantic relations in the sphere of competition policy are a perfect example of what Anne-Marie Slaughter has labeled a ‘new transatlantic order’ with specific and functional regulatory agencies networking with TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY their counterparts and creating a dense web of ‘fast, flexible, and effective’ relations”); and Mark Pollack & Gregory Shaffer, Who Governs?, in TRANSATLANTIC GOVERNANCE IN THE GLOBAL ECONOMY, supra note __, at 297-299 (noting that “governance by transgovernmental networks is limited to specific issue areas, such as competition policy, in which regulators on each side of the Atlantic enjoy considerable de facto or de jure independence from their political masters and are guided by sufficiently similar regulatory laws and cultures.”).

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

435 Interview with a private trade lawyer in Washington DC (Oct. 18, 2001). Confirmed in an interview with an official at USTR on the same day in Washington DC (Oct. 18, 2001). See also Steinberg, Prospects for Partnership, supra note __, at 221.

436 See supra notes... (re cooperation versus confrontational approaches).
contrast, European officials tend to publicly support developing country interests, but discretely stab developing country representatives in the back if the country does not comply with European dictates.\footnote{Interview in Geneva, June 17, 2002.}

Fifth, Washington’s revolving door administrative culture promotes public-private partnerships at home, while impeding transgovernmental public agency coordination. Officials in the European Commission’s market access unit abandoned efforts following the WTO’s creation to institutionalize more cooperation with U.S. trade representatives when their U.S. counterparts left the USTR for the private sector.\footnote{1999 Prince interview, \textit{supra} note \_. It has also been stated that U.S. trade negotiations have been hampered by the USTR’s failure to retain experienced trade personnel. Remarks of former USTR Robert Strauss quoted in U.S. Congress, Senate Committee on Finance, \textit{Trade Agreements Act of 1979}, 96\textsuperscript{th} Cong., 1\textsuperscript{st} Sess. (17 July 1979), S. Rept. 96-249-69 (cited in DESTLER, \textit{AMERICAN TRADE POLITICS} 16 (3\textsuperscript{rd} ed. 1995).} From January 1998 to mid-1999, for example, the chair of the U.S. Section 301 committee changed three times, with one official leaving to the telecommunications giant AT&T and another to a private organization promoting U.S.-African relations.\footnote{Telephone interviews with former USTR officials, May 14 \& 17, 1999.} To be sure, U.S. and EC trade officials periodically contact each other concerning their positions on trade barriers and, where helpful, profit from each other’s submissions to WTO panels. Yet, lack of continuity at USTR hampers sustained strategic U.S.-EC trade policy coordination at the same time that it facilitates an enhanced role for private interests in U.S. domestic public-private trade networks.

\textbf{B. Cross-National Public-Private Partnerships: Collaborations Between Domestic Firms and Foreign Officials.} In light of these obstacles to transatlantic cooperation in trade litigation, private firms often take the lead in initiating cooperative strategies. With transatlantic direct investment totaling around $1.38 trillion dollars, and with U.S. subsidiaries in Europe and European subsidiaries in the United States accounting for over one-third of transatlantic trade,\footnote{See Facts and Figures on the European Union and United States, (last visited August 3, 2002) \texttt{<http://www.eurunion.org/profile/facts.htm>.} See also Mark Pollack and Gregory Shaffer, \textit{Transatlantic Governance in Historical and Theoretical Perspective, supra} note \_, at} large firms have interests
that extend beyond the domestic sphere.\footnote{See, e.g. \textit{Robert Reich, The Work of Nations} 153 (1991) (claiming that “corporate nationality is becoming irrelevant”); and \textit{Robert Reich, Global Economics and the Ecumenical Corporation}, 10 New Perspectives Quarterly 47\# 5, (1991) <http://www.npq.org/issues/v101/p47.html> (“the American Corporation is becoming disconnected from America.... Becoming more typical is the global web, perhaps headquartered in and receiving much of its financial capital from the US, but with research, design, and production facilities spread over Japan, Europe and North America.... This ecumenical company competes with similarly ecumenical companies headquartered in other nations. Battle lines no longer correspond with national borders.”).}

The chemical industry, for example, consists of a limited number of large firms on both sides of the Atlantic with substantial cross-border investments.\footnote{Of the largest five chemical companies in the world, Merck and Du Pont are headquartered in the United States, and BASF, Bayer, and Aventis are headquartered in the EC. \\ \textit{Facts and Figures 2000: The European Chemical Industry in a Worldwide Perspective} (visited Oct. 25, 2001) <http://www.cefic.be/activities/eco/FactsFigures/ > Foreign direct investment in the chemicals sector in the United States was $122.1 billion in 2000, with about 63% coming from Europe (i.e. around $77 billion). Foreign direct investment in the chemicals sector in Europe was around $86 billion in 2000, with about 93% coming from the United States (i.e. around $80 billion). E-mail exchanges with Kevin Swift, Senior Director-Policy, Economics & Risk Analysis, American Chemistry Council, Dec. 17, 2001.(citing figures at www.bea.doc.gov, at 92).}

Since 1995, the primary business forum for coordinated high-level lobbying of U.S. and EC officials has been the Transatlantic Business Dialogue (TABD),\footnote{\textit{Maria Green Cowles, The Transatlantic Business Dialogue: Transforming the New Transatlantic Dialogue,} in Transatlantic Governance in the Global Economy 213 (Mark Pollack and Gregory Shaffer, eds., 2001). Coordinated transatlantic lobbying is not limited to TABD. National chambers of commerce work through the International Chamber of Commerce (ICC) on international matters, with the United States Council on International Business (USCIB) being the peak U.S. organization and EUROCHAMBRES being the peak European representative. However, one of the reasons that the Department of Commerce and Commission created TABD was because they believed that these networks were ineffective. The United States, in particular, felt that European firms were insufficiently involved in EC policy-making during the Uruguay Round negotiations, \textit{id.}, at 218, 225.} which consists solely of large corporations with transatlantic interests.\footnote{Although the TABD was first created through the initiative of the U.S. Department of Commerce and the European Commission, TABD has stimulated a “bottom-up, pragmatic approach” to transatlantic trade negotiations by incorporating the views of firms and trade associations on both sides of the Atlantic. \textit{Maria Green Cowles, The Transatlantic Business Dialogue, supra note__} at 217-221, 226-228. In terms of the negotiation of some regulatory matters, TABD representatives have gained a seat at the negotiating table over transatlantic matters. See \textit{Maria Green Cowles, The Transatlantic Business Dialogue, supra note__} at 216 (“TABD has become at times a ‘quadrilateral forum’ in which the US and EU governments, regulatory bodies, and businesses sit down to discuss and ‘negotiate’ regulatory matters.”). However, some insiders find that the TABD’s impact is much overrated. Interview with a leading trade attorney in Washington DC (Oct. 18, 2001).} TABD and other cross-sectoral associations, nonetheless, play a relatively insignificant role in challenging trade barriers under WTO agreements, since challenges involve relatively technical matters affecting specific firms and industries. Firms rather coordinate challenges on an \textit{ad hoc} basis. They typically coordinate efforts with their transatlantic industry counterparts to work with each other’s home governments. For example, the association of
U.S. spirits producers (DISCUS) worked with the European-based Scotch Whisky Association to coordinate U.S. and EC positions in the Korean alcohol case, following the U.S.-EC conflict in their joint case against Japan.445

Where intergovernmental cooperation stalls, firms may bypass their own governments and cultivate direct links with public authorities in other jurisdictions, forming cross-border public-private partnerships. This is particularly the case with U.S. firms, who are typically more aggressive for reasons presented earlier. Most U.S.-based multinationals and many U.S. trade associations operate government affairs offices in Brussels.446 They lobby the Commission directly, bypassing the USTR. For example, Commission officials have reported that representatives from PhRMA, the U.S. pharmaceutical trade association, contact them about as often as PhRMA’s European counterpart.447 Similarly, when Argentina implemented safeguard measures against footwear imports, Nike representatives met with Commission officials both to learn how the EC was planning to react and to persuade the Commission that the EC had a strong legal and factual case to pursue.448 This effort followed Nike’s lobbying of the USTR to bring a successful WTO challenge against Argentina’s discriminatory taxes on shoe imports.449 Both the United States and EC brought back-to-back complaints against Argentina even though Nike and the European shoe giant Adidas produced their shoes in Indonesia and China, not in the United States or Europe.450 Multinational firms such

445 See supra note... (concerning EC-U.S. conflict within their joint challenge against Japan). See also DISCUS Interview, supra note__ (concerning collaborative efforts in Korean case); and SWA May 1997 Remarks, supra note__ (“It also involved coordinating with friendly foreign spirits industry groups such as DISCUS in the United States and the ACD in Canada with the result that both the United States and Canada acted as co-complainants with the European Union.”).

446 See supra note... (re U.S. lobbying in Brussels).

447 Interview with a Commission official in DGI working on intellectual property matters (June 24, 1999).


449 See U.S. and EU Lodge Complaint Against Argentine Shoe Import Duties, 14 INT’L TRADE REP. (BNA) 1875 (Oct. 29, 1997).

450 Indonesia was a third party to the case. See Raj Bhala & David Gantz, WTO Case Review 2000, 18 ARIZONA J. OF INT’L AND COMPARATIVE L. 1 (2001). For additional background on this case, see U.S. to Back Possible EU Case against Argentine Footwear Duties, INSIDE U.S. TRADE, May 1, 1998, at 11.
as Nike form cross-national public-private partnerships if they promise to expand the firm’s export sales.

Domestic private firms may also discretely assist foreign governments to challenge domestic regulations that they desire removed. Domestic importers of foreign products always benefit from WTO challenges. They sometimes visit Brussels or Washington to help develop a case that they cannot otherwise bring before domestic courts.\textsuperscript{451} Similarly, domestic producers may benefit from WTO challenges to domestic legislation that they could not block through the domestic political process. The intellectual property industry, for example, assists in U.S. and EC challenges before the WTO to the other’s domestic intellectual property laws. The EC copyright industry benefitted when the United States initiated formal WTO consultations against Ireland, Denmark and Sweden over the adequacy of their copyright protection and enforcement procedures. Without the U.S. challenges, changes in EC member state practice would have been delayed for years.\textsuperscript{452} Portugal did not even offer patent protection until the United States asked for formal WTO consultations against it.\textsuperscript{453} Similarly, in the United States, the trade association for the restaurant and bar industry had lobbied Congress successfully for exemptions from paying music royalties, to the detriment of music copyright associations. The European Commission, in challenging the relevant U.S. legislation, met and corresponded with representatives of the U.S. music rights associations BMI and ASCAP. BMI also engaged a U.S. law firm to assist the EC in its case.\textsuperscript{454} The European Commission and U.S. private music rights association were not formal network partners, but they had reciprocal–albeit not identical–interests. The U.S. private association held useful information that it provided to the EC for the EC’s successful challenge.

VI. Conclusion: The \textit{Indirect Effects of WTO Law: Public-Private Partnerships and their Implications}

\textsuperscript{451} See discussion concerning the lack of direct effect of WTO agreements, \textit{supra} note \textsuperscript{__}.  

\textsuperscript{452} Interview with Commission official (June 24, 1999).  


\textsuperscript{454} Interview with Commission official, Brussels (June 29, 1999).
A. The Indirect Effects of WTO Law: The Strengthening of Public-Private Trade Litigation Partnerships. The development of public-private partnerships in the United States and Europe to address international trade claims is a rational response to a more legalized international trading system. WTO legal rights affect company and industry-specific interests. Details of market shares and legal arguments are the province of business executives and legal advocates, not state—or more remote European Community–diplomats. The more legalized international trading system creates stronger incentives for well-placed private actors to engage public legal processes. To litigate effectively in the WTO system, government officials need the specific information that businesses and their legal representatives can provide. Officials therefore strive to establish better working relations with industry on trade matters. The engagement of private firms, in turn, helps public officials render public law more effective. Hence, the reciprocal relationship between WTO public law and private interest.

This deployment of public-private networks in WTO litigation reflects broader shifts in domestic, as well as international, governance. In a world of increasing numbers and complexity, public officials do not hold the resources to effectively implement public policy without the assistance of private parties. Rather, public and private actors reciprocally depend on each other’s resources. Although this development has been theorized primarily in the domestic context,455 public and private actors have adapted public-private collaborative governance modes in making use of the WTO legal system.

This indirect effect of a legalized WTO system is nonetheless significantly constrained compared to a system promoted by many supporters of liberalized trade, under which private firms could directly invoke WTO rules before national courts.456 Some proponents of a liberal trading order maintain that the WTO system should be viewed less as an international treaty than as a new world

455 See supra notes... and accompanying text (re Rhodes on resource interdependencies).

456 Some trade liberals maintain that the defense of private trading rights should be the trading system’s driving normative goal. These trade liberals assert that the WTO system is currently insufficient because it does not require that member states permit commercial and consumer interests to directly invoke WTO rules before member state courts. See e.g., Ronald Brand, GATT and United States Trade Law: The Incomplete Implementation of Comparative Advantage Theory, 2 J. LEGAL ECON. 95, 95-102 (1992); Ernst-Ulrich Petersmann, CONSTITUTIONAL FUNCTIONS AND CONSTITUTIONAL PROBLEMS OF INTERNATIONAL ECONOMIC LAW 243, 463 (1991) (asserting that lawyers should “recognize freedom of trade as a basic individual right”). See also, Symposium, JOURNAL OF WORLD TRADE LAW (1998).
trade “constitution” that grants rights to private traders. Under this vision, private parties would be granted trading rights so that enterprises could act as private attorneys general to ensure the effectiveness of WTO rules, just as is the case under the dormant commerce clause of the U.S. Constitution and Article 28 of the Treaty Establishing the European Community. These commentators would like the United States to go further than representing “clients” before WTO bodies. They would like the United States to promote the right of firms to invoke directly WTO rules in national courts–whether domestic or foreign–without a government intermediary or government interference. Some argue that private firms should have standing to bring claims directly to the WTO in Geneva. However, since private parties do not have the right to invoke WTO rules under internal U.S. or EC law, and only governments have the right to invoke them before WTO dispute settlement panels, at first glance, the world trading order appears to remain a purely intergovernmental system.

Nonetheless, while WTO rules may not have direct effect before domestic courts in the United States, EC or other WTO members, the ad hoc networks formed between public authorities and private enterprises permit WTO rules to be given a form of indirect effect. Indeed, the WTO panel that heard the EC’s challenge to U.S. Section 301 explicitly referred to “the GATT/WTO legal order” as encompassing a “principle of indirect effect,” one that ultimately protects “the economic


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

459 See e.g. John Ragosta, Unmasking the WTO–Access to the DSB System: Can the DSB Live Up to Its Moniker ‘World Trade Court?’” 31 LAW AND POLICY IN INTERNATIONAL BUSINESS 739, 739-784 (2000) (a prominent Washington DC trade lawyer arguing that the WTO “must provide an opportunity for the real party in interest to participate effectively”). Alan Wolff, who litigated for Kodak on behalf of the law firm Dewey Ballantine in Washington DC “advocates deputizing private lawyers for particular cases to strengthen the legal resources of the USTR.” See Claude Barfield, Free Trade, Sovereignty, Democracy, supra note... at 203, fn 8. See also Joel Trachtman, Whose Right is it Anyway? Private Parties in EC-U.S. Settlement at the WTO 18-19 (draft manuscript, April 5, 2002) (on the gradations of private participation in WTO dispute settlement).
activities of individuals. Now that the WTO includes a more effective dispute settlement system, public authorities can negotiate trade claims with greater leverage. They negotiate claims on behalf of private enterprises within the shadow of the WTO dispute settlement system and its growing case law. The WTO system’s legalization enhances certainty; this certainty improves the odds of a profitable outcome; potential profits stimulate enterprises to more actively engage the process. In this way, the WTO promotes a liberal model under which private enterprises play a more active role in litigation and negotiation over regulatory trade barriers. In practice, the WTO system becomes much more than an intergovernmental system dominated by diplomats negotiating behind closed doors.

There remains, of course, a political screen between the private interest and a WTO claim being brought and enforced. First, government representatives are gatekeepers that retain discretion not to bring a claim, or to settle or withdraw a claim, on account of countervailing state interests. Second, WTO judicial decisions may take account of political factors in rendering controversial decisions, as some believe occurred in the Appellate Body’s shrimp-turtle decision. Third, WTO rules favor exporting interests that profit from the dismantling of national trade barriers. As Tim Jackson of the Scotch Whisky Association stated following the EC’s successful WTO challenge of Japan’s tax system applied to European spirits, “Importantly a key point for us as an exporting industry is that our ‘win’ gives us moral and legal leverage over other offending countries which will now be obliged to take the unpopular steps necessary to ensure a fair taxation system for the spirits sector.” SWA May 1997 Remarks, supra note__.

Lobbyists also refer to WTO law in the hope of constraining domestic regulation on the grounds that it would violate WTO obligations. As one European lawyer confirmed, “trade issues and trade arguments are very much used in the adoption of (EU) legislation. I have worked a lot in the EU proposed legislation on electronic take back and restrictions of hazardous substances in electronic products where we used a lot of trade arguments to defend US industry’s interests. I think that focusing also in the legislative adoption phase changes somewhat the approach. The law firms are no longer specific trade law firms but regulatory law firms.” E-mail from Candido Garcia-Molyneux, January 7, 2002.

660 Report of the Panel, United States–Sections 301-310 of the Trade Act of 1974, WT/DS152/R (issued 22 December 1999, adopted 27 January 2000 (not appealed), paragraph 7.78. See also paragraph 7.86 of this report, interpreting Article 23 of the WTO Understanding on the Settlement of Disputes “in the light of the indirect effect such legislation has on individuals and the market-place, the protection of which is one of the principal objects and purposes of the WTO” (emphasis added); and paragraph 7.81 of the report, referring to “the appreciable ‘chilling effect’ on the economic activities of individuals” that legislation such as Section 301 can have.

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663 See supra note...
governments can refuse to comply with the WTO ruling in question, frustrating the private interest at stake, as in the EC-meat hormones case. Nonetheless, the WTO system is significantly more legalized than the former GATT system, providing increased certainty, and thus incentives, to private parties. Although there remains a governmental screen between a government’s bringing of a trade claim and the private interest at stake, that screen has become more porous.

As this book demonstrates, public-private trade partnerships work relatively effectively on both sides of the Atlantic, even though they operate in different manners. The United States, with its tradition of intensive private sector lobbying, its long experience with Section 301 collaborations, its revolving door administrative culture, and its comparative advantage in lawyering, was the first to effectively adopt close public-private partnerships to prevail in WTO litigation.\textsuperscript{464} The EC, however, in a manner adapted to the EC’s institutional structure and administrative culture, has followed suit, adopting a relatively more top-down approach, with the European Commission acting as entrepreneur. To effectively challenge foreign trade barriers, the Commission needed private sector input for its trade claims, which, through methods different than those used in Washington, it obtained.

\textbf{B. The Implications of U.S.-EC Public-Private Partnerships for the International Trading System.} The deployment of public-private partnerships to enforce WTO law could have serious implications for the international trading system, both for its stability and its equity. First, to the extent that public authorities do not appropriately manage and steer these networks, private interest-spurred litigation over regulatory policy could exacerbate tensions among WTO members, and, in particular, those who most often use the WTO dispute settlement system—the United States and EC. WTO judicial decisions that challenge domestic regulatory policy could spur political opposition to a legalized WTO system within the United States and Europe, and thereby potentially undermine a liberalized trading order. Second, the extensive resources deployed by public-private networks in the United States and EC in WTO litigation could exacerbate power asymmetries in the use of the WTO legal system to the detriment of developing countries and their constituents.

\textsuperscript{464} As part III documented, the United States has adopted more of a bottoms-up approach, led by individual firms, trade associations and their lawyers.
1. Implications for U.S.-EC Relations. The legalization of international dispute settlement and the associated adoption of public-private partnerships for trade litigation can affect governments’ choice of cases and litigation postures, and, in consequence, interstate relations. Anyone versed in the ways of Washington can imagine the tensions between public officials attempting to represent the U.S. public interest in WTO litigation and private interests attempting to advance their own. This tension has been multiplied on account of the enhanced role that private parties play in WTO cases and the amount that the government depends on their participation to prevail.

While this book has identified a movement in the EC toward U.S.-style litigation strategies, U.S. and EC approaches are likely to remain distinct on account of divergent political and economic structures, administrative cultures and firm reflexes. Because of the stronger public-private networks deployed in the United States, the USTR appears to receive better prepared complaints. Such activism can facilitate USTR’s work, but at the same time potentially make the USTR more dependent on private firms and associations, especially where USTR’s personnel lack experience and face severe time constraints, which is typically the case. Moreover, since industry brings cases to the USTR more than the USTR self-initiates them, the median U.S. claim may be of greater commercial significance for specific firms, as opposed to U.S. exporters generally. Private lobbying, backed by Congressional pressure, can constrain the USTR’s ability to manage U.S. trade relations with the EC and other WTO members.

The EC’s legal services division, on the other hand, must work more on its own because of the relatively less active participation of European industry, for reasons assessed earlier. In consequence, the European Commission has hired outside professional consultants to report on

\[\text{\textsuperscript{465}}\text{This was confirmed by present and former members of the Commission’s Legal Services division. Interviews in Brussels (June 22, 1999).}\]

\[\text{\textsuperscript{466}}\text{Although the EC initiated and won the most commercially significant case before the WTO to date—the FSC tax subsidy case against the United States—the EC largely brought the case to quash what it considered to be the United States’ overly aggressive use of the WTO system against EC domestic policy, as in the meat-hormones case. The EC will likely use the WTO decision on tax subsidies less as a means to retaliate or otherwise attempt to benefit specific EC enterprises than as leverage to discipline U.S. trade policy and more forcefully negotiate trade conflict resolution. Nonetheless, affected EC enterprises, such as Airbus Industries, certainly follow the case and settlement negotiations with great interest. Interview with a member of the Commission, June 21, 1999. See also supra note.. (re rational for FSC case).}\]
foreign trade barriers, which reports led to a series of EC complaints before the WTO. The Commission, in particular, initiated a number of WTO claims concerning third countries’ use of safeguard procedures, some of which may have been of less immediate commercial significance to individual firms, but ultimately could have greater systemic impact for EC firms as a whole. According to Commission officials, these cases were brought on “principle” for “systemic reasons” to ensure the proper implementation of WTO agreements. Nonetheless, the Commission too is subject to private pressure in trade disputes. Moreover, the fallout from past U.S.-EC trade conflicts can affect the Commission’s trade litigation strategies.

Tensions over U.S. and EC approaches to WTO trade litigation helps explain the friction in U.S.-EC trade relations. EC officials tend to see U.S. positions as driven by discrete politically-connected private interests that interfere with the United States’ ability to negotiate mutually acceptable compromises. Some U.S. commentators concur that a “lawyer culture” dominates U.S. trade policy, such that “trade problems are handled on a case by case basis without setting

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467 See supra note... (interviews re hiring of consultants). These reports have identified barriers around the world in specific sectors, such as the leather sector and the textile sector. A number of these cases were brought to demonstrate to EC industry that the Commission’s TBR and other units desire to work for it. As EC industry develops a reflex to bring cases to the Commission, the need for these consultant reports may diminish.

468 See supra note... One member of the Commission’s Legal Services division questioned why these cases, such as those involving raw hide exports, needed to be brought given the time and cost required for the EC to litigate them compared to the relatively minor economic impact on EC enterprises. Interview in Brussels, June 21, 1999. One reason that the EC may have brought some cases in the early years of the WTO may be on account of the Commission’s search for cases to establish itself. Reinhold Quick Interview, supra note.... Many of the EC’s more recent claims have concerned the application of the United States’ triad of import relief laws—antidumping, countervailing duty and safeguard regulations. In fact, of the nine cases brought by the EC against the U.S. from January 2000 to July 2002, eight involved the U.S. import relief laws. See WTO: Dispute Settlement: Status in Brief of the Disputes (last visited Aug. 14, 2002) <http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm>

469 See supra note...

470 See e.g. John Peterson, Get Away from Me Closer, You’re Near Me Too Far: Europe and America after the Uruguay Round, 45, 62, in Pollack and Shaffer, Transatlantic Governance, supra note... (“The US turned up the volume on bananas so high that any compromise—such as one proposed within the WTO—became impossible”); and at 50 (citing a European official who states, “The US has essentially privatized its trade policy. when there is a strong domestic lobby, they develop a sort of Wilsonian sense of outrage...”). These views are held not only by EC officials, but also by many EC commercial trade associations. Interview with members of EC trade associations for the chemical, automobile and pharmaceutical sectors, Brussels, June 25, 28 & 29, 1999, and a member state representative to the Article 133 committee, Brussels, June 25, 1999.
U.S. authorities, in turn, often are frustrated with the EC’s more convoluted decision-making process, which can undermine trade policy initiatives. They resent EC unwillingness to actively confront developing country trade barriers. Yet, EC authorities too can be subject to intensive firm and member state lobbying pressures. Both U.S. and EC officials can assume belligerent public stances against the other to appease domestic politicians and constituencies.\(^{472}\)

The pressure on public officials from increased private participation in the WTO dispute settlement system potentially can affect one of the WTO system’s central goals— that of providing a peaceful and objective way to settle trade conflicts.\(^{473}\) Impairment of this goal could have wider repercussions for the world trading order. The domestic political fallout from transatlantic trade conflicts over discrete matters could spur greater opposition to a legalized WTO dispute settlement system within the WTO’s two most powerful members, potentially undermining the system. There are, for example, signs of growing discomfort with WTO dispute settlement procedures in the U.S. Congress.\(^{474}\) If the United States and EC, as the world’s great economic powers, no longer adhere

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\(^{471}\) See Ellen Frost, Transatlantic Trade: A Strategic Agenda (1997), at 34 (citing a former Clinton administration official as stating that U.S. trade policy is dominated by “a ‘lawyer culture’: a tendency to handle trade problems on a case by case basis without setting priorities.”).

\(^{472}\) See Peterson, Get Away from Me Closer, supra note ..., at 56

\(^{473}\) I thank Bob Hudec for helping draw out this point from his review of the manuscript. Where public authorities are unable to steer these networks, including on account of private interests’ ability to pressure trade representatives through their lobbying of the U.S. Congress, WTO litigation potentially can undermine diplomatic efforts, with potential negative spillovers in other foreign policy areas.

\(^{474}\) An apparent backlash against WTO dispute settlement has arisen in the Senate in the wake of WTO judicial decisions. against the United States. See, e.g., __ CONG. REC. S4308-26 (online ed. May 14, 2002) (“[O]ur laws continue to be attacked and weakened by dispute panels exceeding their authority.” Senator Max Baucus, Montana); and __ CONG. REC. S4800 (online ed. May 23, 2002) (“These WTO tribunals have violated their mandate not to increase or reduce the rights and obligations of WTO Members; have imposed their preferences and interpretations, and those of a biased WTO Secretariat, on the United States and on other WTO Members; and have issued decisions with no basis in the legal texts they supposedly were interpreting.” Senator Rockefeller, West Virginia). From October 1999 through October 2001, the United States was a defendant in fourteen cases and a complainant in only four. Of those eighteen cases, the United States lost twelve of them, constituting a losing rate of about seventy percent. See Jenna Greene, Grudge Match: Why the United States is on a Losing Streak at the WTO, LEGAL TIMES, November 5, 2001, at 12. Similarly, in its summary of WTO dispute settlement activity in 2001, the USTR reports that the United States was a defendant in twenty-two cases, seventeen of which involved challenges to U.S. import laws. See USTR, 2002 Trade Policy Agenda and 2001 Annual Report, 28-36.

However, although the U.S. Congress has become increasingly concerned about WTO litigation, its concern largely has been about challenges to U.S. import relief laws, the application of which is itself privatized. Under U.S. import relief laws, U.S. firms and trade associations bring legal claims before U.S. domestic agencies and courts, the results of which can have significant impacts on foreign producers. When USTR Robert Zoellick agreed to
to a legalized dispute settlement system, the system could collapse. As structural realist theory predicts, the United States and EC, as the world’s global economic powers, determine the structure and maintenance of the global trading order. To date, they have been at the forefront of multilateral trade liberalization endeavors and, ultimately, of the trading system’s management and stability. If the United States and Europe become disenchanted with a legalized WTO system, the system’s future prospects are dim. Thus, scholars and public officials need be conscious not only of a privatized system’s capacity for enhancing the effectiveness of international trading rights, but also of its destructive potential.

Nonetheless, while U.S.-EC trade disputes spurred by public-private partnerships are contentious, they so far should not be blamed for placing U.S.-EC economic or security relations in jeopardy. Large numbers of U.S. and EC trade claims against each other are a byproduct of the immense volume and broad scope of transatlantic trade, and the normal defense of constituent interests in a legalized setting. Even though politicians and trade officials on one side of the Atlantic constantly criticize their transatlantic counterparts, the United States and EC continue to actively pursue new trade negotiations, as evidenced by the new WTO round initiated in Doha in December 2001 and the granting of trade promotion authority to the Bush administration in July 2002. Actually, the legalization of international trade relations has not induced divergence, but rather greater convergence of U.S. and EC trade policies in regards to the challenging of trade barriers. The binding

475 Great power management of the system is predicted by hegemonic stability theory. See ROBERT GILPIN, GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER 93-100 (2002) (“The theory of hegemonic stability maintains that there can be no liberal international economy unless there is a leader that uses its resources and influence to establish and manage an international economy based on free trade, monetary stability and freedom of capital movement.” Id. at 99-100). Richard Steinberg applies a variant of this theory based on U.S.-EC collaboration, which he terms the “great power management approach.” See Richard Steinberg, GREAT POWER MANAGEMENT OF THE WORLD TRADING SYSTEM: A TRANSATLANTIC STRATEGY FOR LIBERAL MULTILATERALISM, 29 LAW & POL’Y INT’L BUS. 205, 207 (winter 1998) (“article uses realist international relations theory to elaborate the assumptions and logic of a great power management approach to advancing liberal multilateralism”).

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nature of the WTO dispute settlement system has somewhat constrained unilateralism in U.S. trade policy, even while U.S. unilateralism has intensified in most other policy areas. Simultaneously, the EC has adapted to a legalized WTO system, that was initially promoted by the United States, through adopting analogues to U.S.-style public-private trade litigation strategies.

Increased tensions over the conduct of U.S. and EC trade policy are not caused by enhanced public-private trade litigation networks. They are rather a symptom of systemic political and cyclical economic developments, and, in particular, European discomfort with U.S. hegemonic power in the post-Cold War era, and U.S. economic retrenchment resulting in new U.S. protectionist legislation and administrative measures. Trade tensions will always exist, but they so far have not triggered a “trade war” that itself could seriously undermine the global economy, as suggested by press headlines decrying its potential. The United States and EC have developed tools to manage transatlantic economic tensions, including high-level summits and more regular lower level meetings under the New Transatlantic Agenda. The United States’ and EC’s ability to manage politically sensitive cases is evidenced in the handling of the Helms-Burton case, the EC’s regulation of

476 See, e.g., Bill Emmott, Our Law, Your Law, ECONOMIST, June 29th-July 5th, 2002 at 20 (survey) (analyzing the recent increase of unilateralism in U.S. foreign policy--exemplified by its withdrawal from the 1997 Kyoto Protocol on climate change; its rejection of the Comprehensive Test Ban Treaty; a verification protocol for the Biological Weapons Convention, and the treaty establishing a new International Criminal Court; and “its recent disregard for the Geneva conventions on prisoners of war”).

477 See, e.g., Gary Yerkey, Blue-Ribbon Panel Calls for G-8 Standstill on New Trade Barriers Through WTO Talks, 19 INT’L TRADE REP. (BNA) 1123 (June 27, 2002) (noting “the risk of major trade conflict, particularly between the United States and the European Union, [which] represents a real threat to the world economy”); see also William Drozdiak, EU May Hit U.S. With $4 Billion In Penalties; Commission Calls Tax Credits Illegal, The WASH. POST, Aug. 21, 2001, at E1 (reporting that “U.S. Special Trade Representative Robert B. Zoellick has likened any EU sanctions of that magnitude to ‘dropping a nuclear bomb’ on the global trading system”); see also Daniel T. Griswold, WALL ST. J., Dec. 13, 2000, at 10 (“this growing threat of trade retaliation as an instrument of enforcement is an ominous development for trade”).

478 See Pollack and Shaffer, Transatlantic Governance, supra note.... See Peterson, Get Away from Me Closer, supra note, at 65 (“the US and EU, after the bananas case, seemed gradually to be learning how to limit the political damage of what they decided-- for whatever reason-- to inflict upon each other juridically”). See also Gary Yerkey, U.S., EU Agree on New Guidelines to Improve Cooperation on Regulatory Policy, 19 INT’L TRADE REP. (BNA) 696 (April 18, 2002).

479 See Peterson, Get Away from Me Closer, supra... note, at 58
genetically modified foods, and the United States’ foreign sales corporation tax regulation. Even the controversial U.S.-EC banana dispute was eventually settled. Although tit-for-tat trade protectionism could inflict severe economic harm, and justifiably raises fears of the danger of trade restrictive policies spiraling out of control, the risk of a trade war lies less in strengthened public-private partnerships to challenge foreign trade restrictions, than in old-fashioned private legislative and administrative lobbying for trade protectionism.

2. Implications for the Equity and Effectiveness of the International Dispute Settlement System. Second, legalization of international trade relations does not benefit equally all WTO members. Since the United States and EC alone participate in almost all WTO cases, either as parties or as third parties, they exercise much greater influence in the shaping of WTO law though litigation than do other WTO members. A central attribute of WTO law, as compared to national or EC law, is that it requires consensus to modify, so that the WTO political/legislative system remains extremely weak. Changes in WTO rules only take place through infrequently-held negotiating

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480 See Pollack and Shaffer, *The Challenge of Reconciling Regulatory Differences: Food Safety and GMOs*, supra note...

481 See, e.g., Gary G. Yekey, *Trade Tensions Between U.S. and EU Ease after Latest Zoellick-Lamy Meeting*, 19 INT’L TRADE REP. (BNA) 1127 (June 27, 2002) (noting an agreement between U.S. and EU trade officials “that–despite their differences–continued cooperation between the United States and the EU remains essential to ensuring progress in global trade negotiations... and that it was critical to keep bilateral disputes in perspective”); see also Gary G. Yekey, *EU Will Not Act Against U.S. in Tax Dispute If Congress Appears to Be Making Progress*, 19 INT’L TRADE REP. (BNA) 1219 (July 11, 2002) (citing an EU decision to “hold off on retaliation” despite a WTO ruling enabling such an action, “to give Congress time to work its way through the issue”).

482 Anthony Depalma, *U.S. and Europeans Agree on Deal to End Banana Trade War*, N.Y. TIMES, Apr. 12, 2001, at C1 (emphasizing the role of negotiation and compromise in the agreement bringing the nine-year trade dispute to an end).

483 See supra note... (re U.S. and EC participation in WTO cases).

484 Under Article X of the Uruguay Round Agreement Establishing the World Trade Organization, only a few provisions require a unanimous vote to be amended. From a technical perspective, most provisions can be amended by a 2/3 vote of the members, and will either take effect only with respect to those members or with respect to all members, depending on whether the provision alters the “rights and obligations” of the parties. See WTO Agreement X:1. In addition, WTO members may decide by a three-fourths majority that an amendment is of such importance that “any Member which has not accepted it within a period specified by the Ministerial Conference... shall be free to withdraw from the WTO or remain a Member with the consent of the Ministerial Conference.” WTO Agreement Art. X:3. See generally Raj Bhala and Kevin Kennedy, *World Trade Law* § 4(f)(3) (1998). In practice, however, there have been no amendments to WTO rules since the WTO’s creation. Moreover, all prior amendments to GATT
rounds (around once per decade), involving complex tradeoffs between over one hundred and forty countries with widely varying interests, values, levels of development and priorities. Because of the complex bargaining process within the WTO, rules are often purposefully drafted in a vague manner as part of a political compromise. WTO members thereby delegate significant power to the WTO dispute settlement system to interpret and effectively make WTO law. Those governments that participate most actively in the dispute settlement system thus are best-positioned to effectively shape the law’s interpretation and application over time.

In addition, not all private parties, including within the United States and Europe, benefit equally from a more legalized international trading system. As in most litigation situations, given the financial demands and legal and factual complexity of bringing a successful complaint, large and well-organized interests are best positioned to avail themselves of new legal rights through hiring lawyers, economists and other consultants. Shifting litigation to the international level exacerbates the imbalance. The legal forum is distant. Legal expertise is less widespread and thus more expensive. The political process is more complex. While many WTO critics crudely and inaccurately characterize the WTO as a system designed to benefit footloose multinational firms, it remains true that multinational firms are typically best informed and most likely to make use of international trading rights. This is the case because multinational firms have high per capita stakes in the outcome of international trade disputes. They are the world’s largest traders and consequently the most directly affected by the details and interpretive nuances of agreed rules. They thus have the

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485 Individual WTO cases involve not only resolutions of particular disputes, but also the interpretation and shaping of WTO law in the absence of an international legislative or executive check.

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

487 For example, in the early 1980’s, approximately forty percent of global trade was intra-firm trade conducted by 350 of the world’s largest multinational corporations. See World Bank, GLOBAL ECONOMIC PROSPECTS AND THE DEVELOPING COUNTRIES (1992). The same held true in the 1990s. See Edward M. Graham, GLOBAL
incentive to inform themselves, organize and generally play an active role. They also hold the resources to engage in complex, prolonged litigation in a remote forum, which they are willing to dedicate to these issues because of their stakes.

Small and medium-size enterprises, on average, have lower per capita stakes and thus reduced incentives to engage the process. The costs of informing themselves of the issues and organizing to have their views represented often outweigh the potential, but uncertain, benefits of pursuing their interests through international trade litigation. Moreover, public officials have limited resources to help them overcome collective action barriers. Public officials can create databases and file a few publicized cases. But overall, large and well-organized interests remain best situated to exploit the process. Because of the weakness of the WTO political structure, private parties too can shape WTO law by working with U.S. and EC officials in the litigation process.

With the creation of the WTO, an area of international law may have become more like law as we commonly perceive it. Yet, it is not the neutral technocratic process some of its proponents idealize it to be. Even the richest WTO members have become dependent on the assistance of private parties. If the United States and EC are dependent on assistance from private firms and trade associations, what does this bode for developing country participation in the system? Those who support the creation of international trading rights need be cognizant of how they will be used—that is, of the law-in-action. And yet, forsaking such law will not rid the world of systemic biases either. As always, the choice is among imperfect alternatives.

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488 See Pollack & Shaffer, Who Governs?, supra note __, at 304 (“large transatlantic firms have perhaps the greatest per capita stakes, given their relatively small number and the size of their trade and investment across the Atlantic”); and Komesar, supra note __, at 8, 68 (maintaining, “The character of institutional participation is determined by the interaction between the benefits of that participation and the costs of that participation.... Interest groups with small numbers but high per capita stakes have significant advantages in political action over interest groups with large numbers and smaller per capita stakes.”)

489 See e.g. supra note... (re success of spirits industry in working with US and EC officials). In particular, the industry successfully shaped the interpretation of “like product” as used in GATT article III in a broad manner, so that Japan and Korea were forced to equalize taxes on domestic rice-based alcohol and foreign grain-based alcohols.

490 The phrase imperfect alternatives is used by Neil Komesar in the title of his book IMPERFECT ALTERNATIVES: CHOOING INSTITUTIONS IN LAW, ECONOMICS AND PUBLIC POLICY (1994) (a book calling for assessment of policy in terms of its likely handling by alternative institutions–be they courts, legislatures or markets–in which different
If one opposes or is skeptical of trade liberalization endeavors, or if one fears that excess private influence can trigger the bringing of inopportune, politically-charged cases that could undermine the trading system, one will be more wary of large and well-organized commercial interests working the system. Partnerships between the world’s dominant economic powers (the United States and EC) and the world’s largest private commercial enterprises (located in them) justifiably exacerbate these concerns. Just as in domestic litigation, the haves more likely come out ahead at the international level.\textsuperscript{491} Even if one supports trade liberalization, one may be concerned about issues of accountability and appropriate public steering of these networks so that they pursue public, and not just private, ends.\textsuperscript{492}

However, while some criticize U.S. and EC trade policy as being captured by private parties will be better, or less well, represented). As Komesar notes, all institutions are imperfect. The key issue is which alternative is relatively less imperfect. Given systemic biases of the WTO judicial system toward the wealthy and politically connected, one obvious alternative is to curtail cross-border trading rights, resulting in more closed economies throughout the world. Such curtailment, however, would arguably reduce aggregate national welfare in developed as well as developing countries. It would also not eliminate coercive political and economic pressures, but rather could exacerbate them. As Trachtman writes, “litigation is a form of governance, related to legislation. Control over litigation is a form of governance, and should be informed by these analytical perspectives.” Joel Trachtman, Whose Right is it Anyway? Private Parties in EC-U.S. Settlement at the WTO 58 (draft manuscript, April 5, 2002).


\textsuperscript{492} See e.g. discussion in RHODES, THE NEW GOVERNANCE, supra note___ at 661, 666. This is particularly a concern as regards implementation of the TRIPS Agreement in developing countries. For a study of the impact of the TRIPS Agreement on India, see, e.g., Jayashree Watal, Pharmaceutical Patents, Prices and Welfare Losses: Policy Options for India Under the WTO TRIPS Agreement, 23 WORLD ECONOMY 733 (2000) (noting “that prices are likely to increase and welfare likely to decrease” in India). See also, Keith Maskus, Intellectual Property Issues for the New Round, in THE WTO AFTER SEATTLE 137, 142 (Jeffrey Scott ed., 2000) (noting an estimate of “static risk transfers... of some $5.8 billion per year” to the United States, and “a net outward transfer of around $1.2 billion per year” for Brazil); and Alan Deardorff, Should Patent Protection Be Extended to All Developing Countries? 13 WORLD ECONOMY 497, 507 (1990) (“patent protection is almost certain to redistribute welfare away from developing countries”).
interests, public-private networks also can ensure more effective enforcement of WTO rules. Ultimately, WTO rule violations affect individual firms and industries. Those firms and industries most likely know the factual details of violations and best judge their commercial significance. If one believes in the appropriateness of legal trading rights to open commerce across borders, public-private networks should be expanded, not curtailed. Although firms pursue their self-interests in international trade litigation, their engagement also may give rise to public benefits (or, in the language of economics, positive externalities). Open trade policies can result in enhanced competition, greater consumer choice, and lower prices, resulting in increased standards of living. From this perspective, public-private networks in the United States and EC are models for successful implementation of WTO law.

Nonetheless, whatever be one’s perspective on trade liberalization and its enforcement, developing countries and developing country constituents clearly are at a disadvantage before the WTO’s current dispute settlement system. As Busch and Reinhardt have documented, developing country participation in the system actually declined during the first six years of the WTO vis-a-vis their relative participation under the less-legalized GATT. Legal scholars thus need to address mechanisms that can be developed to offset biases under the WTO’s legalized system. These measures could include the granting of assistance to developing countries so that they may pursue and defend WTO legal claims at a reduced cost. Such assistance now has a prototype in the new

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

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

495 Busch and Reinhardt, Testing International Trade Law, supra note...
Advisory Center on WTO law in Geneva. WTO remedies and procedures also could be modified to offset structural biases favoring the WTO’s most powerful members and their most powerful constituents, as is currently being discussed in Geneva. Mechanisms for the mediation of politically-sensitive claims could be incorporated.

This book has documented the role of resource interdependencies and reciprocal public-private interests in explaining the rise of public-private trade litigation networks in the actual deployment of WTO law–its law-in-action. The book thereby has laid the groundwork for more informed normative assessments of the relative merits of alternative approaches to ensuring broader participation in the attainment of an open trade regime’s goals, while safeguarding social choices made by local constituents.

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496 See Welcome to the Advisory Centre on WTO Law, at www.acwl.ch (last visited Aug. 9, 2002). See Kim Van der Borght, The Advisory Center on WTO Law: Advancing Fairness and Equality, 1 J. INT’L ECON. L. 723 (1999). The Advisory Center is to provide legal services to developing countries in WTO litigation at reduced rates. The Center is funded through an endowment and user fees, the fees being imposed on a sliding scale in relation to the country’s pro rata share of global trade and its per capita gross national product.

497 The author was part of a session for developing countries to prepare their positions in the context of the 2002-2003 review of the WTO Dispute Settlement Understanding. As regards how WTO remedies could be modified to enhance developing country participation, see e.g. Victor Mosoti, In our own Image, Not Theirs: Damages as an Antidote to the Remedial Deficiencies in the WTO Dispute Settlement Process; a View from Sub-Saharan Africa, 19 B.U. Int’l L.J. 231 (fall 2001).

498 See, e.g., CLAUDE BARFIELD, FREE TRADE, SOVEREIGNTY, DEMOCRACY: THE FUTURE OF THE WORLD TRADE ORGANIZATION 112-125 (2001) (proposing mediation by the WTO Director-General or a panel of “eminent persons” for certain types of cases). The United States has proposed a mediation system to the European Union for transatlantic disputes. See Gary G. Yerkey, U.S. Proposes New Mechanism for Settling Trade Disputes with EU Involving Early Talks, 18 INT’L TRADE REP. (BNA) 889 (June 7, 2001) (referring to a “U.S. proposal for an enhanced ‘dispute management procedure’”).

499 The author has received funding to complete an article addressing the relative merits of alternative approaches to revising the WTO dispute settlement system in order to offset the systemic biases that developing countries face.