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RUSSIA'S WTO ACCESSION:

U.S. LEGAL OPTIONS FOR NORMALIZING TRADE RELATIONS WITH THE BEAR

-- SPEAKING NOTES --

Presentation to Global Business Dialogue

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-- SPEAKING NOTES --

My thanks to Judge for the honor of speaking on today's very distinguished panel. I have prepared brief comments under two headings:

- With Russia's WTO accession moving to conclusion at the government-to-government level, but Congress seemingly in no mood to act on normal trade relations ("NTR"), what options are available? In particular, what elements of the current Jackson-Vanik annual review process could be preserved if politics so demand?

- What other elements of existing US trade policy toward Russia will (or may) have to be adjusted in light of WTO accession?

I. Jackson-Vanik/NTR

My fellow panelists have done a great job laying out the prevailing view about the WTO-inconsistency of the Jackson-Vanik "annual NTR" mechanism and the need, so long as that mechanism remains in place, to invoke the WTO Agreement's non-application provisions.

But I think the prevailing view is wrong about what WTO law, and the term "unconditionally" in GATT Article I, require. I say this in full knowledge that it puts me out of alignment with a lot of very smart people – and also that the result it points to is an unwelcome one. But I actually don't think the result should be unwelcome. I'll explain why in a moment.

And to be clear, *I do not oppose PNTR for Russia*. Please do not put in your briefing notes that "Magnus spoke against PNTR." I think it would be terrific to consign Jackson-Vanik to the Cold War chapter of history books. But Congress does not appear to be persuaded – far from it – and there is now a realistic chance of not just invoking "non-application" but becoming mired in that scenario for what could be a very long time.

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That, I do oppose. In my view, the choice between straight PNTR for Russia and non-application is a false choice. Organizing our behavior according to that false choice is not a sensible thing to do.

The easiest way to appreciate this – to hone in on what the word "unconditionally" in GATT Article I requires and allows – is to start with what we know for certain.

- Surely the U.S. Congress can debate, at any time, whether the United States should continue to trade on normal terms with any WTO Member. Nothing in any of the WTO agreements regulates the content of legislative debates.

- Surely such a debate would not become prohibited by virtue of being held, and re-held, annually, for example during the same week in early July. Even if the vehicle for such a debate were legislation to suspend normal trading with a particular WTO member, singled out year after year for this humiliating treatment, the debate itself cannot offend GATT Article I.

- Logically, the same must be true (no GATT violation) if the vehicle for debate is a Resolution accorded, by the rules of one or both legislative chambers, streamlined treatment.

Now, if you are still with me at this point, then you believe that at least 95% of the existing annual MFN process is perfectly WTO-consistent. Pointless, maybe; retrograde, perhaps; but fully compatible with the United States' international obligations.

Indeed, the better view is that GATT Article I can be offended only by actually denying – not by debating or having procedures to debate whether to deny – MFN treatment to products at your border. The MFN commitment promises a result: appropriate treatment of incoming products. How a Member delivers that result through its legal system is its own business. Dispute settlement decisions interpreting "unconditionally" in GATT Article I do not refute this view.

This is not to say that all methods of providing normal (MFN) treatment are equal policy-wise. But I do believe they are all equal, and must be considered equal, legally.

The upshot? You will continue to hear it said that "withholding PNTR delays our ability to benefit from Russia's WTO commitments." That is true *only* if we invoke non-application. If we don't actually *need* to invoke non-application but we do so anyway, … what you have then is the trade policy equivalent of an "own goal."

In time, a determined Executive Branch will be able to sell PNTR for Russia – if not outright repeal of Jackson-Vanik – to a balky Congress. In the meanwhile, there is no reason for the United States to leap at non-application. If Russia finds (as would be understandable) maintenance of Jackson-Vanik to be hugely offensive, *it* may choose to keep its trade relationship with the United States on a

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bilateral basis, and may invoke non-application. Better for Russia to make that choice. My guess is that Russia would prefer – and would choose even in this scenario – to have a WTO-based trade relationship with Uncle Sam.

II. Other Aspects of Applied U.S. Trade Policy

Tariff treatment is not the only aspect of applied U.S. trade policy implicated by Russia's WTO accession. One potentially-difficult issue is the method utilized by the United States to regulate nuclear fuel imports from Russia (previously managed via an antidumping suspension agreement, now handled in a more straightforward-but-WTO-incompatible manner through quantitative limits fixed in statute). Also on this list are differences in how Section 301 of the Trade Act of 1974 applies (or would apply) to post-accession Russia. Perhaps some of these "other issues" can be explored during Q&A.

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Thanks for your attention. I look forward to the questions and discussion to follow.

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