PORTALS TO WTO DISPUTE SETTLEMENT:

THE PROCESSING OF INDUSTRY COMPLAINTS IN WASHINGTON AND BRUSSELS

-- SPEAKING NOTES --

Presentation to the Fall Meeting of the
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Good morning and thank you for attending this panel, which is one of the International Trade Committee's contributions to the programming at this year's Fall Meeting of the ABA Section of International Law.

Our topic today is the process by which WTO complaints are investigated and, sometimes, born in the two most important capitals (at least numerically) for this sort of activity: Washington and Brussels.

I'll start with the U.S. side of the story, covering process followed by politics, and then conclude with some brief comparisons to the situation here in the EC.

I. U.S. System for Initiating Trade Complaints

The key components of the system we need to understand here include gathering mechanisms, vetting mechanisms, and propulsion mechanisms. Let me explain.

Gathering

By *gathering* mechanisms I mean the methods by which trade complaints – usually but not always market access problems – are initially identified for consideration in Washington. Sometimes companies and industry groups, communicating either directly or through counsel, bring trade problems to the government's attention. And sometimes the government itself cites and draws attention to trade problems. This happens on a general basis in the annually-published *National Trade Estimate of Foreign Trade Barriers*, a compendium of foreign governments' trade-affecting misdeeds that are known to the U.S. government, and happens in a more targeted way through annual listings of foreign barriers in sectors like telecommunications, government procurement, and intellectual property protection. Specific complaints also surface in annual exercises aimed at, for example, highlighting trade problems arising from foreign government subsidies and reviewing the eligibility of particular countries and products to benefit from unilateral U.S. trade preference programs.

These categories overlap in practice. When the U.S. government "self-identifies" barriers, it does so after soliciting (and to a great extent on the basis of) public comment. The government's ability to discover barriers is limited, and absent a

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request from an affected U.S. stakeholder, its inclination to "list" a foreign government measure -- often viewed as a condemnation -- is even more limited.

Vetting

A complaint initially raised for consideration might or might not have merit. The cited foreign government behavior may or may not be genuinely offensive; it may or may not have the adverse effects asserted by a complainant; and it may or may not present serious questions of conformity with trade commitments made at the government-to-government level. In short, it may or may not be a fit subject for U.S. government action.

So we need, and we have, *vetting* mechanisms, aimed at deciding what complaints to espouse generally, and what complaints to take to the WTO specifically. This vetting process is mainly run by the Office of the US Trade Representative, but other agencies can play important roles.

Regarding the decisions made in this context about whether to espouse a complaint generally, two key points:

- Vetting officials strictly enforce a "self-help" requirement. While open in principle to helping a complainant overcome foreign market barriers, they want to know that they are not the first resort. They ask specific questions like: what local resources have you deployed in the foreign capital to promote the result you seek, and what have you done to make your product more attractive? And they ask general questions like: have you done everything possible, and is U.S. government pressure the only remaining option? Inability to give the right answers to these questions will almost always earn the complainant a "no" from the officials approached.

- Officials will also consider the context, starting with the existing bilateral agenda between the United States and country complained against. Sometimes that agenda is crowded with unresolved items, making officials reluctant to raise a new issue. A thin bilateral agenda is not necessarily promising either, particularly if it has been kept thin for broad foreign policy or geo-political reasons. But sometimes, a complaint comes along at a time when U.S. trade officials are open, or even eager, to have some new beef to raise within a bilateral relationship.

In considering whether to recommend recourse to WTO dispute settlement, officials consider additional factors:

- They have, both by nature and pursuant to political directives, a strong preference for "clear winners" and for cases likely to attract allies so that the United States does not have to act alone.

- They are cautious about recommending challenges to certain types of measures (*e.g.*, environmental or antidumping measures) and generally

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reluctant to espouse cases whose prosecution would require making arguments that raise "defensive" concerns for the United States.

- They will consider the broader context of the WTO, and of U.S. objectives within the WTO system. Pending multilateral negotiations, at least when there appears to be a significant chance of a near-term breakthrough, are generally viewed as dampening new dispute settlement activity. Officials will also consider the history and current status of other WTO litigation matters between the United States and the other Member in question. (However, the U.S. government does not launch dispute settlement proceedings in a "tit for tat" fashion, as some other Members have done.)

- Finally, they will try to predict whether opening a formal dispute would actually help to solve the problem. Would starting litigation interfere with available options that might produce at least a partially favorable result more quickly? Could a legal victory be achieved – and if achieved, would it likely lead to changes in the measure complained of? In this context, officials will be aware – and counsel to complainants should recall as well – that in this realm there is no necessary connection between a legal result and a commercial result. Two cases highlight the point. In *EC -- Hormone-Fed Beef*, the United States won a smashing legal victory and obtained no significant changes in the EC measures limiting access for U.S.-origin beef (legal result 1, commercial result zero). Conversely, in *Japan – Photographic Film*, the U.S. complaint failed dismally in dispute settlement but led to improved market access anyway (legal result 0, commercial result 1).

A final point about vetting: it occurs at multiple levels within the agencies concerned, and it depends heavily on details. Political level officials will not espouse a complaint without obtaining favorable staff-level advice. And staff-level officials are detail-oriented; they require extensive factual documentation regarding both the cited foreign practices and their economic effects, and normally take a good deal of time to become comfortable with the information presented to them. Bringing staff-level officials along to the point where they are fluent in the details of, *and genuinely offended by*, particular trade barriers is a challenging task for even the most effective advocates. But it is essential. And while officials can at times be overly skeptical, a high evidentiary bar is not improper. In my experience, most government officials are willing to extend themselves to solve problems, but have limited bandwidth and access to facts. Effective input from trustworthy non-government sources is critical. (It is unfortunate when such activity is wrongly swept into cross-cutting criticisms regarding the practice of "lobbying.")

Propulsion

A complaint that strikes the officials who have examined it as deserving action will not necessarily receive action. This brings us to the topic of *propulsion*.

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The Cabinet-level entities in the U.S. government with trade portfolios – the Office of the USTR and the Commerce Department – are in a subordinate position (inherently, structurally) to other Departments, such as State and Treasury, which by virtue of their own imperatives tend to prefer to calm and diplomacy to muscular, friction-causing trade initiatives. Thus, even when the trade-focused agencies are persuaded (at both the staff and political level) of the merits of pursuing a complaint, it is not uncommon to find a standoff within the Executive Branch. An external shock is often needed to get things started.

Congressional pressure can sometimes supply the necessary impetus. Trade initiatives rarely achieve lift-off without it.

Of course, Congressional-Executive dynamics can be complicated in the United States, especially in "divided government" scenarios like the current one. Priorities on both sides of the Congressional-Executive tug-of-war are ordinarily dominated by non-trade items. And all legislators are not created equal when it comes to the ability to prompt Executive Branch action on trade matters of interest to constituents. When and how to introduce signals of Congressional interest, into the atmosphere in which Administration officials are studying a trade complaint, is a matter of high strategy and more art than science. Every case is unique. But it is safe to say that an Administration will find it much more comfortable to launch a trade initiative when it can point to significant Congressional pressure, and that the most effective Congressional inputs come from Members whom the Administration has reasons to want to treat solicitously.

So propulsion can be tricky. Despite this – despite the structural and practical impediments – a lot of trade initiatives have been launched in Washington and a good many of them have been taken into WTO dispute settlement. Most of these efforts have prevailed, at least in a legal sense. The record of commercial results is more mixed, but certainly not shabby.

Section 301

Many of you may be wondering why I have not yet mentioned Section 301 of the 1974 Trade Act, which used to be the primary framework for both vetting and acting on U.S. industries' trade complaints. The reason is that Section 301 is no longer regularly used at the initial stages of a dispute or kept running in the background as WTO litigation moves along. Complaints can be teed up for consideration, espoused by the government, and taken into WTO dispute settlement without a petition being filed (or an investigation opened) under Section 301.

Section 301 does remain relevant in cases where the United States prevails with a WTO complaint, fails to persuade the offending Member to revise the offending measures, and winds up receiving authority to suspend concessions. In that scenario, Section 301 provides domestic legal authority to retaliate. Issuing an affirmative Section 301 determination infuses the USTR with extraordinarily broad

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power to disrupt trade. (To help you remember this point, think of what happens when Popeye eats spinach.)

And of course, Section 301 is still theoretically available for cases where a foreign government's behavior is terribly offensive and yet not violative of any existing trade commitments. This is the (in)famous Section 301(b), and it has fallen out of use with no apparent prospect of rising from the dead. (The details here are interesting but off-topic for a panel on "portals to WTO dispute settlement.")

II. Politics Related to U.S. Offensive Use Dispute Settlement

Now that you understand the basic procedures and practical/policy factors that apply when trade complaints are under examination in Washington, let's tease out two more points about the politics.

First, consideration of new complaints is significantly affected by the United States' experience as a defendant. Offensive interests motivated the U.S. push for "binding" dispute settlement in the WTO. We envisioned our involvement in the system as being primarily in a complainant's posture, or at least thought our offensive use of the system would matter much more (commercially and politically) than our experience as a defendant.

The reality has not conformed to this vision. We have indeed filed a lot of cases, and used the system to enforce negotiated commitments and expand our commercial opportunities. But our experience of the system has been at least as heavily defined – in my view, somewhat more heavily defined – by the extraordinary number, character, and success rate of cases filed against us.

I'll skip over, unless it comes up in Q&A, a discussion of the soundness of these decisions and the implications for the dispute settlement system itself.[1] The facts relevant to our topic today are that (1) the United States has lost a slew of defensive cases, (2) these cases have involved some of the most sensitive areas of sovereign prerogative such as how we raise money, spend money and regulate against vice, and (3) the political impact, in a country that believed it had faithfully implemented its WTO obligations, has been significant.

Why is this relevant here? Because the painful experiences on defense mean that offensive cases carry an extra political burden. Our successes on offense have to be, or at least appear, sufficient to outweigh something very weighty.

You might expect this to lead to a greater readiness to launch complaints, in hopes of racking up victories and fattening that side of the balance sheet. But a stronger, countervailing force is unease about the political implications of unsuccessful complaints in what has come to be regarded as a pro-plaintiff

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[1] Readers may consult some prior musings under the title *What Do All These Adverse WTO Decisions Mean?* at www.tradewinsllc.net/publi/GULC-1-03.pdf.

forum. A failed offensive effort could reinforce perceptions that the United States simply cannot get a fair shake in WTO dispute settlement. And a case that Administration officials do not take forward is one that cannot later, if it fizzles, be hung around their necks by critics. Risk-aversion -- the instinctive preference for "clear winners" -- is reinforced.

Second, political debate in Washington relating to trade "enforcement" has intensified and may be cresting. It is of course an easy thing, and a longstanding tradition, for members of the party not controlling the Executive Branch to criticize the vigor and/or effectiveness of the incumbents' enforcement efforts. And rhetoric about "enforcement" can be used to justify or mask more basic anti-trade positions. ("I won't support pursuing or implementing new trade agreements until we have corrected the scandalous failure to enforce the rights we have bargained for under agreements already in force.") So, not all of what one hears or reads on this subject should be taken at face value.

But Congressional Democrats have through persistence built their critique about the Bush Administration's infrequent (compared to the Clinton Administration's numbers) resort to dispute settlement into a formidable cudgel. And that cudgel has been picked up by Senator Obama in the current Presidential campaign, in a way that arguably exceeds the usual low profile of trade policy in general elections. In sum, the notion that we need to "do more to vindicate our rights" in the trade field, which periodically approaches the status of catechism in the United States, now seems basically to have attained it.

It is not easy to predict where this rhetoric will lead. But to get a sense of the range of possibilities, I commend to your attention S. 1919, a bill jointly introduced by Senators Max Baucus (chairman of Senate Finance Committee) and Orrin Hatch (second-most senior Republican member of that committee), which proposes numerous structural changes to the trade enforcement regime in Washington. Among these proposed changes are renewal of the "Super 301" mechanism for identifying priority foreign trade barriers and creation of a new Senate-confirmed chief trade prosecutor position within the Office of the USTR.

III. Comparison to the Situation in Brussels

Your panel includes a supremely qualified commentator on the EU system for processing trade complaints, and I am in no position to improve on his presentation. But a few points of comparison might be helpful as fodder for the Q&A portion of our time together.

The U.S. and EU systems are, as you might expect, broadly similar. The two governments have comparable vetting processes, run by expert and conscientious officials operating in a political environment. Facts, along with sound legal and economic analysis, matter greatly in both systems. The behavior of both governments as potential WTO complainants is influenced by systemic concerns, and defensive considerations, and possible diplomatic impacts. Both

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see offensive WTO cases as vehicles for solving commercial problems and, occasionally, for scoring points or accumulating leverage. Both systems feature significant public-private interaction in the initial stages and indeed throughout the WTO litigation process.

Two areas of difference are worth noting.

First, the actual decision-making processes, once you get past initial staff-level review, look different. Meetings and votes of the famous "133 committee" have no real analogue in the U.S. system. Interagency review within a unitary Executive Branch in the United States differs importantly from the power-sharing arrangements between the Commission and Council in the EU. One way to think about this: lacking full foreign policy competence, the EU as such does not have a direct counterpart for the role (normally a cautionary role) played by the U.S. Department of State. The vetting process in Brussels is therefore missing what might otherwise be a natural limiting influence on resort to dispute settlement in trade matters. This function is replicated, but perhaps incompletely, by the decisional input of the Council -- which represents the Member States where full foreign policy competence does reside.

Second, although both governments have defensive considerations, they do not have the same ones. For example, the European Commission which administers a highly politicized antidumping/countervailing duty regime, with remedial measures subject to a public interest test and to qualified majority voting in the Council, gets much less mileage out of those remedies than the U.S. government does; as a result, it is far more willing to pursue cases whose success might constrain the ability of all WTO Members to use those remedies. The same is true of the global safeguard remedy, which the Commission (1) has found itself unable to use and so (2) has openly sought, through dispute settlement cases, to make unavailable to other Members as well. While readier than the United States to bring or threaten complaints in these areas, the Commission is probably less ready to complain about, for example, regional integration (FTA or customs union) measures that may fall short of the standards in GATT Art. XXIV.

There are more points of comparison, but we'll let them come out in Q&A.

* * *

I am very grateful for your attention this morning, and look forward to your questions.

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