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Antitrust Action Moves To Europe

EU Seen as Friendlier Forum For Slowing Down Mega-Deals

BY JENNA GREENE

In the ever-shrinking world of global commerce, American companies set on sabotaging a domestic competitor's merger are increasingly turning to the European Union for help.

It is a cut-throat strategy, and not without risk, but large U.S. corporations have come to realize that lobbying regulators in Brussels can be a back-door way to delay approval, impose conditions, or block a rival's deal outright.

Now, with conservatives Charles James and Timothy Muris poised to take the helm of U.S. antitrust policy, lawyers on both sides of the Atlantic say that aggressive EU appeals are likely to grow more common in the years to come.

"My advice to clients is to go in there with all guns blazing," says Patton Boggs partner Glenn Manishin, a telecom and antitrust specialist. "The EU is already more aggressive than American antitrust has been, and certainly will be more aggressive than any Bush antitrust [regulators]."

While few competition lawyers expect a dramatic shift in U.S. policy, most anticipate that officials here will start to take a more hands-off approach to approving deals, especially those that create efficiencies of scale.

The result? Europe will stand out even more as a place where regulators may be persuaded to intervene.

Consider GTE Corp.'s strategy for killing the MCI-Worldcom merger, or Walt Disney Co.'s attempt to derail AOL Time Warner, or Sun Microsystems Inc.'s bid to stop Microsoft Corp. from acquiring a stake in Telewest. All are examples where high-profile American intervenors directed substantial firepower on influencing proceedings in Europe.

"American firms are increasingly running to Brussels to complain. They now know Brussels is a more receptive audience," says William Kolasky, an antitrust partner at Wilmer, Cutler & Pickering. "Given how effective their opposition of mergers has been in Europe, I expect the trend to continue."

The EU has been in the business of reviewing mergers for 10 years and has jurisdiction over deals where total European revenue tops $225 million. Although precise figures were not available, EU Competition Commissioner Mario Monti says that "cooperation in merger cases has been more intensive during the last 12 months than ever before. A large number of operations were scrutinized simultaneously on both sides of the Atlantic."

While the relevant antitrust law in the United States and the EU is similar, a basic procedural difference explains much of the enthusiasm for making a case in Brussels: In the EU, third parties are an integral part of the process.

"The U.S. will listen to competitors, but tends to discount their views," says Barry Hawk, a New York-based antitrust partner with Skadden, Arps, Slate, Meagher & Flom. "In the EU, far more weight is given to competitors' views."

Indeed, the EU solicits written comments from rival companies when considering a merger. If a second-stage investigation is opened, a two-day hearing is held in which competitors have the opportunity to testify. In the United States, by contrast, the role of competitors is more constrained, and regulators here tend to be skeptical of their motives.

"We listen very closely to customers, but competitors we have to listen to with a more critical ear," says Randolph Tritell, assistant director for international antitrust at the Federal Trade Commission. "The question is, why are they complaining?"

The answer, almost invariably, is because they have something to gain—and if U.S. regulators are not inclined to hear them out, the EU provides a satisfactory alternative.

"A lot of companies are trying to influence the merger process, not out of any real competitive concerns, but just to be a nuisance to their competitors, or because they hope the commission will impose conditions," says Frank Montag, an antitrust partner in the Brussels office of Freshfields Bruckhaus Deringer. "It's quite common. . . . And as long as one has the impression that it is relatively easy to be at least partially successful, people will continue to do it."

Increasingly, U.S. companies are going all-out to exert influence over the outcome of the proceedings in Brussels.

"Intervenors put a huge amount of effort into this," says Rachel Brandenburger, who is also with Freshfields and works in Brussels

and London. “They sometimes do nearly as much work in employing attorneys and economists as the parties themselves.”

For competitors, the most modest goal is to delay a transaction’s approval by raising so many questions that EU regulators feel obligated to open a second-stage investigation, which takes four months.

“Often, getting a deal into stage two accomplishes what you want, because the timetable goes to pot,” says Michael Reynolds, head of London-based Allen & Overy’s European antitrust practice.

Lawyers cite Boeing Co.’s acquisition of the satellite division of Hughes Electronics Corp. last fall as one example where input from competitors such as Lockheed Martin Corp. and Arianespace pushed the deal into stage two review. The EU ultimately cleared the deal without conditions, while, ironically, the FTC imposed several of them.

An earlier Boeing merger, with McDonnell Douglas in 1997, is infamous among the international antitrust bar as an example where a third-party intervenor, in that case the European commercial aircraft maker Airbus Consortium, had a dramatic impact on the review process. The FTC cleared the deal, while the EU was prepared to block it. Ultimately, in the face of White House intervention and the threat of a trade war, the EU approved the transaction with conditions.

As another example, one with an all-American cast of players, lawyers point to efforts by the GTE Corp. (now Verizon) to derail successive MCI mergers.

When MCI and Worldcom announced their intention to merge in 1997, GTE was one of several vocal opponents, both in the United States and in Europe. To help convince regulators in Brussels that the merger was anti-competitive, the company hired prominent French economist Jean Tirole, who wrote a paper warning of the network effects and tipping points of the union. When the EU held closed-door hearings on the deal, GTE General Counsel William Barr, attorney general under former President George Bush, spoke, according to a company spokesman.

GTE advocated that MCI be forced to divest its Internet backbone—a recommendation that was ultimately adopted by the European Commission when it approved the deal in July 1998. The backbone was then scooped up by Britain’s Cable & Wireless, another intervenor in the deal, although C&W later sued MCI over the acquisition.

Still, lawyers call that acquisition a classic example of what companies hope to accomplish by complaining to Brussels. “It’s not just to derail mergers,” says Michael Miller, special counsel with Sullivan & Cromwell in New York. “Sometimes, you want to buy some piece of the company. Then you can ride up on a white horse and take the little gems off the parties’ hands.”

But the MCI-Worldcom merger provides another lesson, this one cautionary, about the consequences of complaining. At GTE’s side, protesting almost as loudly about the effects of a union between MCI and Worldcom, was the Sprint Corp. Less than two years later, the company was back before the EU, this time with the awkward task of explaining why MCI plus Worldcom would create a monopoly, but MCIWorldcom plus Sprint was OK. The EU blocked the deal last summer.

Brandenburger of Freshfields says she has several questions for companies that are considering opposing a merger: “Do you really want to do that? What are your plans and aspirations in the future? Could you find yourself wanting approval for a merger and having shot yourself in the foot with your previous arguments? And what if you’re not successful? Is there some way the merging parties can retaliate against you?

“You have to have really high stakes to decide not to pull punches,” she says.

In recent years, EU experts say overworked regulators have relied too heavily on information provided by competitors.

“It’s an almost common view now among practitioners in Brussels that the commission may have gone too far,” says Montag of Freshfields. “The commission is aware of the criticism being voiced by quite a number of people now, and hopefully, they will be looking a bit harder at what competitors tell them.”

While measuring the results of intervention is difficult, Miller of Sullivan & Cromwell reports instances where EU regulators have sometimes adopted his arguments almost verbatim. “I’ve seen decisions where I say, ‘Boy, that text sounds pretty familiar,’ ” he says, although he declines to name examples, citing client confidentiality.

As for the EU, Monti defends the commission’s practice. “We are sufficiently non-naive as to be able to discount the elements provided by competitors for their vested interest,” he said last week at the American Bar Association’s antitrust meeting. “Competitors are a rather powerful source of information for overall assessment of mergers and potentially for the identification of remedies.”

Despite all the efforts by intervenors in Brussels, the United States and the EU have yet to reach totally opposite conclusions on a merger, where one agency says yes and the other gives a flat-out no.

While such a scenario, says Tritell of the FTC, is “theoretically possible, we do what we can to minimize the differences.”

Still, he adds, “while some may say the EU is more solicitous of the views of competitors, almost to a case, we still come out in the exact same place in the end.” ■

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Steeling For Battle

Should Bush soften his free-trade stance and give U.S. steel special protection in exchange for fast track authority? The world is watching.

BY JENNA GREENE

On its face, it seems contradictory: The solidly free-trade Bush administration is sending signals that it may impose quotas on imported steel.

But for President George W. Bush, putting up barriers to protect the beleaguered U.S. steel industry may be a small price to pay for what he really wants—fast track trade authority.

Bush will have to display considerable finesse to pull off such a political horse trade. He needs to cobble together a coalition of free-traders and steel protectionists in Congress while placating domestic steel consumers and withstanding pressure from abroad. It won't be easy.

Fast track—or as Bush prefers to call it, trade promotion authority—would allow the president to negotiate trade agreements and present them for a simple yes or no vote, without allowing Congress to make any amendments. Bush highlighted his desire for it in his address to Congress. Bill Clinton was forced to negotiate without such authority after Congress stripped him of it in 1994.

Unions and many Democrats have already said they won't support fast track in exchange for steel protection. "There's no way we're going to allow our members' livelihoods to be held hostage to the administration's push for fast track," says Leo Gerard, president of the United Steelworkers of America. But some swing voters—House Republicans previously opposed to fast track—sound more receptive.

"I will not rule out considering that," says Rep. Bob Ney (R-Ohio), mimicking the language used by U.S. Trade Representative Robert Zoellick in a recent meeting on steel. With 16,000 steel jobs in his district, Ney is both a champion of the $50 billion industry and strong opponent of fast track; in 1998, he led Republican resistance to the proposal. The measure was defeated 243-180, with 151 Republicans voting in favor and 71 against.

But Ney adds, "Pure fast track, I'm not going to support that. A lot of people won't."

Others think a direct quid pro quo—steel for fast track—is unlikely, but say a move by Bush to protect U.S. steel will create "progress and momentum that will help when they get to other, more difficult issues," according to a spokeswoman for steel caucus member Rep. Sander Levin (D-Mich.).

Adds David Phelps, president of the American Institute for International Steel, which supports free trade: "The steel industry and their friends were a major reason why Clinton didn't get fast track. . . . I think the Bush administration understands that."

Experts and onlookers put the odds of new steel import quotas—with or without a direct fast track link—at better than 50-50. Last week, Credit Suisse First Boston upgraded its ratings on steel stocks to "buy," based in part on anticipation that the U.S. government may act to limit imports.

"I know of no trade problem that has been given as much high-level attention in recent years," says Alan Wolff, a partner in the D.C. office of New York's Dewey Ballantine who represents domestic steel companies. "Every report I get is of great seriousness of purpose in remedying the problem."

Ironically, despite strong pressure from organized labor, the Clinton administration turned down steel industry requests for help. The Bush administration may be more receptive in part because of the series of bankruptcies—10 in the last five months—that have rocked the industry. USTR officials did not return calls seeking comment.

"This industry cannot continue to go on like this," says Gregg Warren, spokesman for the Weirton Steel Corp. in West Virginia. "We've got to do something."

PUTTING ITC ON THE CASE

Domestic steel producers say that the United States has been the dumping ground for excess world production since 1998, when the economies of East Asia, Russia, and Brazil tanked. In addition, European producers who previously sold steel in Asia began diverting their products to the United States. The result? A surge in steel imports, from 30 million tons a year to 38 million, and a price decline from $330 per ton of hot rolled sheet, for example, to $220—$50 below cost for most U.S. producers.

The industry has aggressively filed anti-dumping cases, but it is looking for broader, industrywide help.

Steel industry and union officials say Zoellick has told them that the administration is considering their request to launch an investigation at the International Trade Commission.

Such a procedure, known as a Section 201 investigation, provides a way for the United States to erect trade barriers without violating World Trade Organization obligations.

On April 6, Bush appeared to pave the way by rescinding the nomination of ITC Commissioner Thelma Askey.

One of six ITC commissioners, Askey was targeted as an enemy of steel after voting against the industry in a dumping case. When her term expired in December, Clinton filled her slot with the recess appointment of steel favorite Dennis Devaney.

Shortly after taking office, Bush renominated Askey, a move that triggered howls of protest from steel supporters. Sen. John Rockefeller IV (D-W.Va.) actually vowed to "lie down in front of a truck" to stop her nomination.

Faced with the certainty of a bitter fight, the White House appeared to back down, shunting Askey off to the tiny U.S. Trade and Development Agency instead. A White House spokeswoman declines comment.

The move has energized steel supporters. "If I could," says Rep. Ney, "I would be doing cartwheels across the rotunda of the Capitol."

The makeup of the ITC is a key piece of the puzzle. If the president launches a Section 201 investigation, it is the ITC commissioners who make the threshold determination of whether imports have been a "substantial cause of serious injury" to an industry.

If at least three commissioners vote yes, they then recommend a remedy to the president, who has total discretion to decide what relief, if any, will be offered. If the majority votes no, the case ends there.

To some observers, withdrawing Askey's nomination amounts to "an attempt to stack the ITC," says Jon Jenson, chairman of the Consuming Industries Trade Action Coalition, which represents the interests of steel-consuming companies like automakers and oil and gas drillers.

"It sent a terrible signal," agrees Russell Smith, special counsel at the D.C. office of New York's Willkie Farr & Gallagher, which counts Japanese and Brazilian steel makers as clients. "It shows the steel industry can successfully intimidate the administration on a crucial issue like the independence of the ITC."

Mark Glyptis, president of the Independent Steel Workers Union, bristles at the suggestion. "We didn't think she was objective, so we didn't think [her removal] compromised the ITC's objectiveness."

Askey could not be reached for comment.

Building Barriers

Unlike dumping or countervailing duty cases, Section 201 investigations require no finding of an unfair trade practice. A petition can be brought by the president, the USTR, Congress, industry, or unions, but it is seldom pursued—in the past 11 years, just 11 cases have been filed.

The reason? Although the ITC commissioners determine if there is injury, the president decides the remedy.

"You could spend a lot of money and time, and if [the president] doesn't support it, it's a waste," notes Glyptis.

Of previous Section 201 investigations, perhaps the best-known is the Harley-Davidson case, decided in 1983. Then-President Ronald Reagan agreed to impose a declining five-year tariff on competing motorcycles from Japan. During this time, the company reorganized and actually asked for the tariffs to be removed one year early.

But free-trade supporters argue that the Harley-Davidson case worked because it was targeted to a single company.

"How do you evaluate injury to an entire industry?" says Jenson of the steel consumers trade group.

Jenson's group has been lobbying Congress and the administration against protectionism, stressing that for every one job in steel, there are 50 jobs in companies that use steel in their products. Still, Jenson admits that for many such companies faced with a cost increase in raw materials, "their approach is not necessarily to go to Washington."

Indeed, a D.C. lawyer who follows steel closely says steel consumers are not as well-organized as steel advocates. By contrast, he says, in the current dispute over Canadian lumber, consumers like Home Depot and the Lowe's Cos. have vigorously fought against additional trade barriers.

"The noise [from steel advocates] is not being balanced by broader interests," he says, speculating that steel consumers may be reluctant to antagonize suppliers.

The extent of consumer resistance will be determined in large part by the scope of Section 201 relief. The two major issues are whether to make relief contingent on industry restructuring, and whether to add quotas on top of existing dumping orders and tariffs.

If the end result is quotas plus tariffs, Phelps of the American Institute for International Steel predicts, "Customers will be coming out of the woodwork screaming bloody murder."

The United States must also walk a fine line when it comes to dealing with the international community.

"Every major trading country in the world is watching the U.S. to see what we do on steel," says Smith of Willkie Farr & Gallagher. "A bad decision on steel will almost certainly result in the U.S. losing economic credibility."

Later this month, Bush will travel to Quebec to meet with leaders from 33 other Western Hemisphere nations to discuss creation of a Free Trade Agreement of the Americas. Steel onlookers predict he will take no action until after the conference, sparing him the awkward position of pushing for open markets, except when it comes to U.S. steel.

But the administration's moves have already alarmed Japan, Korea, and the European Union. The *Korea Times* reports that Korean and EU steel-makers met on March 21 to take a common stance against U.S. protectionism, and Korean and Japanese steel-makers met April 9 in Tokyo.

"Japan is very upset with the proceedings," says Charles Butler of the Japan Steel Information Center in New York. "Seventy to 75 percent of steel production is already affected by one dumping duty or another."

Adds Phelps: "What would be the value of fast track if half the world is pissed off at us for closing this market? It would be a Pyrrhic victory of devastating proportions." ■

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The Little Agency That Could

How ITC Became Prime Venue In Intellectual Property Cases

BY JENNA GREENE

It's the docket that ate Washington. Droves of big-firm lawyers. Fortune 500 companies. Million—even billion—dollar fights over intellectual property.

And the battlefield? The International Trade Commission, an obscure, 360-employee agency that has increasingly become the venue of choice to litigate major global IP disputes.

In its 85-year history, the ITC has never seen an onslaught of cases to rival the deluge of the past nine months.

And what cases they are. One current dispute over patent rights to interactive television, for example, involves more than 170 lawyers from 18 firms, including Hogan & Hartson, O'Melveny & Myers, Kirkland & Ellis, and Morrison & Foerster.

Already, IP case filings in fiscal year 2001 have exceeded the last two years combined. Not since 1986 has the agency seen such volume, and in those days, the average case was not nearly as complex—or enormous.

"There is a lot of intense litigation going on," says Lynn Levine, who heads the ITC's Office of Unfair Import Investigations, which acts as a third party representing the interest of the public in IP cases. "We're very pressed. . . . This is the heaviest caseload we've ever encountered."

A quasi-judicial agency, the ITC employs three administrative law judges who preside over a relatively small number of cases—25 this year to date—brought under Section 337 of the Tariff Act of 1930. Most often, the disputes involve imported goods that are alleged to infringe on U.S. patents.

"These are very complex cases," says Cecilia Gonzalez, a partner at Howrey Simon Arnold & White. "If you look at the lineup of cases currently pending, most involve cutting-edge technology or markets where the money involved is millions and millions and millions of dollars." She adds, "These tend to be bet-the-company type cases."

For example, an adverse ruling from the ITC triggered an overnight $2.5 billion stock drop for laser eye surgery equipment maker VISX Inc. in December 1999.

Perhaps the biggest attraction of the ITC is speed—most cases are wrapped up in one year, compared to the two or three years typical in federal court. The feat is even more impressive considering the size of many ITC cases.

The great grand-daddy of them all is the 170-lawyer, interactive television case filed in February by Gemstar-TV Guide International Inc. against the Pioneer Corp., Scientific-Atlanta Inc., the EchoStar Communications Corp., and SCI Systems. But other pending ITC cases are occupying a significant chunk of D.C. lawyers as well.

There's the case brought by the Intel Corp. against Altima Communications Inc. over integrated circuit devices used in telecommunications and networks, involving some 50 lawyers at Fish & Richardson and Finnegan, Henderson, Farabow, Garrett & Dunner.

Meanwhile, another 45 lawyers from 10 different firms—including Howrey Simon; Baker & McKenzie; and Venable—are duking it out in a dispute over network interface cards brought by Proxim Inc. against 14 companies.

Another 50-plus lawyers are fighting over semiconductor chips with minimized chip packet sizes. The case was brought by Tessera Inc., represented by Wilson Sonsini Goodrich & Rosati; Finnegan, Henderson; and Fish & Neave. On the other side is the Sharp Corp., represented by Clifford Chance Rogers & Wells and D.C.'s Armstrong, Westerman, Hattori, McLeland & Naughton, and Texas Instruments, which has retained Jones, Day, Reavis & Pogue.

Some of the cases don't even involve U.S. companies. Japan's Yamaha Motor Co. and Sanshin Industries, which together hold 11 U.S. patents for personal watercraft (more often called jet skis), are suing Bombardier Incorporated of Canada for patent infringement over products distributed in the United States. The Japanese companies hired Newport Beach, Calif.'s Knobbe Martens Olson & Bear; Foley & Lardner; and Willkie, Farr & Gallagher. Dorsey & Whitney and New York's Morgan & Finnegan are representing Bombardier.

"There is no citizenship requirement here," says Levine of the ITC. "We have had quite a number of foreign entities who have taken advantage of the statute."

Adds Smith Brittingham of Finnegan Henderson: "The U.S.-versus-foreign-company model no longer has much vitality. It could be any company versus any company."

Going Shopping

The decision to file a patent case with the ITC is essentially forum shopping, since the same grievance could also be pursued in almost any federal court.

Patent litigators say the ITC's recent surge in popularity can also be explained in large part by procedural changes at the U.S. District Court for the Eastern District of Virginia.

Once fabled as the "Rocket Docket," the EDVA these days feels more like a Greyhound bus to some.

"The Alexandria Division about two years ago stopped accepting a number of IP cases," says Gonzalez. "Many cases are transferred to Richmond or Norfolk, which are not as fast as Alexandria, not to mention not as convenient."

Inundated with patent cases from around the country, the Eastern District moved to relieve the burden by randomly assigning patent cases filed in Alexandria to all three divisions. In addition, lawyers report that Alexandria judges have grown more likely to move patent cases to another court altogether.

"It doesn't take much at all for a motion for transfer for improper venue to be granted," says Sturgis Sobin, a name partner at D.C. trade boutique Ablondi, Foster, Sobin, & Davidow. "It's becoming harder and harder to get a patent case to stick in the Eastern District."

Faced with the prospect of litigating in a venue like North Carolina or Michigan or California, the largely D.C.-based international patent bar has embraced the ITC as an attractive alternative.

The expertise of the judges, who hear virtually nothing but patent cases, is cited by lawyers as yet another reason for turning to the court.

"People on both sides are interested in having a judge who understands patent law," says Sobin. "The ITC judges know patent law. It's rare you lose because the judge doesn't understand what he should be doing."

Yet another reason for the jump in ITC cases, lawyers speculate, is the overall economic climate.

"In 1999, if you could spell 'dot-com,' you were rich," says Ralph Mittelberger, a D.C.-based partner at Boston's Fish & Richardson, who notes that just eight ITC cases were filed that calendar year. "But when things slow down, people pay more attention to patents and overseas competition. At that time, people again realized how valuable the ITC is as a tool for protecting intellectual property from unfair competition from abroad."

The Real Rocket Docket

Still, not all IP disputes fall under ITC jurisdiction. To be eligible, the product in question must have been made or assembled, at least in part, overseas.

Another consideration is the remedy, since there are no monetary damages at the ITC. But in some ways, the prize for winning is even better: the total elimination of a competitor's product in the U.S. marketplace for the life of the patent.

"It can be very effective," says Bryan Schwartz, a D.C.-based of counsel at Morrison & Foerster who is president of the ITC Trial Lawyers Association. "The remedy can be much faster and broader because the U.S. Customs Service enforces the order [to exclude the products] at all ports in the U.S." A U.S. district court, he adds, has no such authority to compel customs to act.

Ultimately, the speed that makes the agency so attractive to clients ends up being rather brutal on those who actually litigate the cases. Or, as Gonzalez puts it, "They are not for the faint of heart."

Agrees Mittelberger: "The 337 cases are good for clients but terrible on lawyers. You hear of people ending up 500 hours above their billable goals. I had a lawyer who told me that after doing one ITC case, he would never do another."

They're no cakewalk for the judges, either. The ITC resolves cases so quickly by speeding up deadlines. Rather than having 30 days to respond to motions, ITC litigants usually have 10 days. Discovery generally lasts about five to six months—a process that can drag on for years in federal court cases of similar size.

The actual hearing, similar to a federal bench trial, takes several days to a few weeks. The administrative law judge usually takes 60 days to issue an initial determination, which is then subject to approval or modification by the agency's six commissioners, who are political appointees.

But just because the judges dispense with cases quickly does not mean they do so carelessly.

Overall, the ITC's decisions fare well on appeal before the U.S. Court of Appeals for the Federal Circuit. Between 1986 and 1999, according to an analysis by Foley & Lardner, the Federal Circuit affirmed ITC decisions 66 percent of the time. While almost half of ITC cases wind up settling, Foley also determined that the ITC found patent infringement 23 percent of the time, and no violation 21 percent of the time.

Two of the ITC judges, Paul Luckern and Sidney Harris, who did not return calls seeking comment, have both worked for the agency for 17 years. The third judge, Delbert "Chip" Terrill, 53, started last month, replacing Debra Morriss, who resigned for personal reasons.

According to Levine, the ITC also might soon hire a fourth ALJ on a temporary basis to help with the workload.

Still, it's not like the average person can just fall into the job.

Terrill, who declined to be interviewed, was an ALJ with the Federal Energy Regulatory Commission for 12 years. Prior to that, he served in the Air Force, in the Executive Office of the President during the Gerald Ford administration, as legislative counsel to members of Congress, in the U.S. Office of Special Counsel, and in the U.S. Attorney's Office for the District of Columbia.

While most lawyers believe Terrill will have a significant learning curve ahead of him, he'll have to do it on his feet—he has cases set to go to trial in July, August, and September.

His first case looks like a routine ITC matter—in other words, it's a whopper, with 50 lawyers from 10 law firms fighting over host signal processing modems.

"Talk about baptism by fire," says one lawyer. "We'll have to see how the new fellow works out." ■

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Grudge Match

Why the United States is on a losing streak at the WTO

BY JENNA GREENE

The political rhetoric is so common, it has become almost cliché: The United States has the most free and open markets in the world.

But if that's the case, why is the country being sued so often—and losing so often—before the World Trade Organization?

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.

Most often the cases have involved trade disputes over steel, but U.S. measures attempting to protect domestically produced lamb meat, wheat gluten, and combed-cotton yarn, for example, have also been found illegal under WTO rules.

The losing streak is likely to continue: Several cases that trade lawyers describe as all but unwinnable are in the pipeline. Nor are the losses inconsequential. One, involving tax breaks, could result in up to $4 billion in tariffs on U.S. goods exported to Europe.

Trade experts say the reason the United States so often finds itself in the hot seat has to do with the country's application of anti-dumping, countervailing-duty, and safeguard laws. All are tools used by the government to protect industries from allegedly unfair overseas competition involving such things as goods being sold below cost in this country.

Whether the poor showing by the United States is the result of illegitimate protectionism or WTO bias is unclear. But one thing is certain: U.S. trade laws are in the cross hairs of many WTO member nations. As the WTO prepares to convene in Doha, Qatar, at the end of this week, almost all representatives from the 142 member countries are pushing to take up the issue if a new round of WTO talks is launched.

"If you put our trade laws on the negotiating table, they will be gone, rendered useless," says D.C.-based trade lawyer Roger Schagrin of Schagrin Associates. "That's what everyone else in the world wants."

Responds Kaye Scholer partner C. Christopher Parlin: "Dumping will be on the agenda. Period. Full stop. The U.S. is completely isolated in opposing this. There will be no new round without renegotiation of [anti-dumping laws], and, in my opinion, there will be no successful conclusion without some of the revisions in the current rules sought by other countries."

But the prospect of any negotiations that would weaken U.S. trade protection has drawn a sharp response from Congress, where 63 senators signed a letter to U.S. Trade Representative Robert Zoellick opposing any negotiations that could result in weaker U.S. trade laws.

Despite his reputation as an ardent free-trader, Zoellick, it seems, has gotten the message. In a speech last week to the Council on Foreign Relations, he said, "We can only maintain domestic support for trade if we retain strong, effective laws against unfair practices. Although some nations are critical of the U.S. application of these rules . . . we will continue to insist that any consideration of WTO rules focus first on getting the practices of others up to U.S. standards."

This tension over U.S. trade laws predates the 1995 founding of the WTO. During negotiations, other countries argued that the dumping laws should be considered a prohibited trade barrier. But Mayer, Brown & Platt partner Mickey Kantor, who was the U.S. trade representative at the time, reports that the U.S. delegation threatened to walk out at the last minute "unless our trade laws and philosophical underpinnings were preserved."

STACEY CRAMP

The United States' trading partners blinked, and the U.S. laws received the WTO's blessing—at least in theory. In practice, the dispute-settlement process has served as an alternative avenue of attack, one that has been embraced with increasing gusto in the last two years.

"Clearly, they are trying to do by indirection what they couldn't do by direction," says Kantor.

Sens. Max Baucus (D-Mont.), Jay Rockefeller (D-W.V.), and Jeff Bingaman (D-N.M.) reached the same conclusion. In an Oct. 1 letter to Zoellick, they expressed fear that the Doha negotiations would pave the way for "other countries to continue by negotiation what they have begun to do by litigation. If anything,

our focus should be on rolling back some of the dispute settlement decisions in these areas, not exacerbating the problems they engendered."

A Secret Court

While some have called the WTO the "Global Supreme Court of Commerce," the dispute-settlement process lacks many standard features of a court.

For one thing, the entire process is secret. Not only is the public barred from hearings, but even industries and companies directly affected can't participate.

Briefs are also kept confidential, unless a country chooses to release them on its own (as do the United States, the European Union, Canada, Australia, and New Zealand). Amicus briefs are accepted at the discretion of the governments involved in the case, to the intense irritation of environmental and other advocacy groups.

The United States has led the fight to make the process more open, although it remains an uphill battle. "We have a very transparent system of litigation and decision making in general," says USTR General Counsel Peter Davidson. "We think the WTO should move toward greater transparency in dispute settlement as well."

Cases are initially heard by a three-member panel chosen from a roster of eligible "neutrals," most of whom are trade lawyers, economists, or other trade specialists, but not professional jurists. Only minimal safeguards exist for vetting conflicts of interest.

Most panel decisions are appealed to the WTO's seven-member appellate body, which usually upholds the panel's findings. The results tend to be predictable, for it is a rule of thumb among WTO lawyers that the complainants almost always win.

In part, the United States' recent poor record is explained by this fact. During the last two years, the United States was on the defensive 14 times. By comparison, in the same time period, just five cases were filed against Canada, the second most popular target.

Of those 14 cases, the United States won two (a complaint brought by Canada involving export restraints treated as subsidies, and another involving the Trade Act of 1974), lost 11, and one, involving Cuban trademarks, was more or less a draw.

The United States also brought four cases against other countries during this time period, and won three of them.

Prior to 2000, the United States was more often on the offensive and won more than half of all its cases.

"You have a system in which bringing cases seems to result in affirmance 90 to 95 percent of the time," says Terence Stewart of D.C. trade boutique Stewart and Stewart. He questions where one could find another tribunal, domestic or international, with that kind of record.

Sovereign Strategies

Despite its shortcomings, the dispute-settlement process has many defenders.

They point out it is a young system, not quite seven years old, and certain rough spots are to be expected. And they say it is better than what it replaced: a weak system under the General Agreement on Tariffs and Trade that allowed losing parties to block unfavorable decisions. The system is also fast: Most cases take two to three years.

"I'm a big fan," says D.C.-based O'Melveny & Myers partner Gary Horlick, who describes himself as a "hired gun" for U.S. and foreign companies with an interest in WTO cases. "The system works. People use it."

In his experience, says Horlick, the mere threat of WTO action can spur countries to fix problems.

Indeed, the USTR counts these cases, which don't show up on a win/loss balance sheet, as its greatest successes.

"Often the threat of litigation forces a settlement," says Davidson of the USTR. Ideally, this means U.S. stakeholders get results within months instead of years.

At the same time, some lawyers report that the USTR has been reluctant to bring cases that might create unfavorable precedents. Nonetheless, the United States recently won an anti-dumping case against Mexico over high-fructose corn syrup.

"The number one lesson we've learned is that consistency in the U.S. position has been crucial," says Davidson. "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."

When litigation is necessary, says Wilmer, Cutler & Pickering partner Robert Novick, who served as general counsel of the USTR from 1999 to 2001, "One thing the system does that is very important is to help de-politicize issues. Countries can let the WTO decide who's right and who's wrong, instead of getting their whole relationship in knots."

In addition, says Horlick, the WTO provides a way to take care of irritating issues that "would kick around forever on a bilateral agenda."

For example, he points to a dispute among France, Canada, Peru, and Chile involving sea scallop labeling. "It's not central to the government of France what it calls scallops, so if an outside body says stop, they will," he says.

Where the system breaks down, though, is when bigger issues are at stake.

To date, the most notable case involves the European Union and hormone-treated beef from the United States. With a public that tends to be deeply suspicious of "Frankenfoods," the EU banned the importing of such meat. The United States objected, and in 1998 the WTO appellate body ruled that there was no scientific proof that hormone-treated meat is harmful. Nonetheless, the EU refuses to accept U.S. beef from cows treated with growth hormones.

The WTO-approved recourse has been for the United States to impose more than $100 million in retaliatory sanctions on goods imported from Europe, such as Roquefort cheese, mustard, and chocolate—something of a Pyrrhic victory, since it's U.S. consumers who ultimately pay the tariffs in the form of higher prices.

The next collision—one that is potentially much larger—seems likely to come over U.S. trade laws.

Already, the WTO has found one U.S. law, the rarely-used Anti-Dumping Act of 1916, to be inconsistent with WTO rules. Senate action repealing or amending the law will be necessary to bring about compliance. Another law, the Byrd amendment, is almost certain to be struck down. Passed by Congress last year, the law lets companies that file successful anti-dumping complaints in the United States pocket the duties collected. Ten nations plus the EU have launched a WTO challenge—more co-complainants than any other case in WTO history.

None of this is likely to make the WTO any more popular with some members of Congress. “The most delicate issues are those when a statute is challenged,” says Novick. “The question of sovereignty comes into play.”

The string of losses on anti-dumping/countervailing duty cases has raised more worries about whether any supposedly legal U.S. trade protection actions can pass muster with the WTO.

“There was a strong belief that what we negotiated in good faith in the Uruguay round [creating the WTO] provided good cover,” says Stewart. “The domestic bar in the U.S. is getting a redefinition of the agreement.”

Davidson of the USTR says, “These are hard-negotiated agreements. They take many years of parties fighting over the details. We need to make sure the panels are respecting these agreements and interpreting them the way the parties intended them to be interpreted, and not doing creative gap filling.”

He points out that since 1995, the Department of Commerce has issued more than 800 anti-dumping and countervailing-duty determinations, and that seven WTO panels, covering 19 determinations, have been established in response to complaints from foreign governments. (Four other potential cases, covering five additional determinations, are currently the subject of WTO consultations.)

Even if the numbers show that most decisions aren’t challenged, that’s little comfort to lawyers who achieve hard-won victories at home only to see the WTO undo their handiwork.

“The process is so skewed against users of these laws,” says Schagrin of Schagrin Associates. As a lead lawyer in the recent ITC steel safeguard hearing, Schagrin says that even though a remedy hasn’t been announced, he’d “bet a ranch” that they’ll lose at the WTO, “regardless of the way the ITC writes the decision.”

To some lawyers, the real reason that U.S. anti-dumping and other trade safeguards enjoy such strong political support at home has much to do with the steel industry.

“The dumping law is the steel industry’s law,” says Hogan & Hartson partner Lewis Leibowitz, who has opposed the industry in trade proceedings. “The steel industry could get the Senate to condemn Mother Teresa.”

Indeed, the industry has been the single biggest user of such laws in recent years, accounting for roughly half of all cases before the ITC.

To Leibowitz, the United States’ losing streak in the WTO is not a reflection on the substance of the trade laws, but how they are applied. “The U.S. loses every case because our trading partners pick cases that are losers for us,” he says. “If you look at the decisions, they are about the reasoning of very deliberate practices by the U.S. Commerce Department and International Trade Commission.”

Other lawyers stress that the attack on U.S. trade laws doesn’t mean our markets are not generally open and barrier-free.

“The U.S. probably has a competitive advantage in 95 percent of sectors, but not in everything,” says a D.C. trade lawyer. “The vast majority of [dumping] cases are with products where the U.S. doesn’t have the comparative advantage. That’s where protectionism lurks.” ■