

THE EU TRADE BARRIERS REGULATION COMES OF AGE

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It is our pleasure to offer this contribution to the academic festivities surrounding Professor Ehlermann's 70th birthday. It was tempting to reminisce here about our appearances before Dr Ehlermann in his capacity as a member of the WTO Appellate Body, when we acted as private counsel to WTO Governments. However, deontological constraints and the WTO principle of confidentiality prevent us from doing so. We have therefore chosen a different subject, which is related to Professor Ehlermann's work and our own work as practicing lawyers.

I. INTRODUCTION

The bulk of WTO disputes is triggered by private industries, with grievances about foreign government measures. This paper tells the story of how such private grievances end up in WTO dispute settlement, still notorious for its aversion to private participation.

As part of a legislative package implementing the Uruguay Round, the EU¹ created a new trade remedy to enforce its rights under the various WTO agreements as well as certain other international agreements. The Trade Barriers Regulation establishes rights for private parties to complain about illegal trade

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¹ We have chosen to use the term 'EU' as the common currency for the organization still known as the 'European Community' or 'European Communities' in various contexts. Similarly, the 'European Commission' refers to the 'EC Commission'. Yet where legal or historical precision makes this unavoidable, we will revert to 'EC', 'Community' and other such terms of art.

practices of third countries, and to request the EU authorities to intervene swiftly and effectively.² This trade remedy replaced the so-called New Commercial Policy Instrument, which was introduced in 1984 to deal with foreign unfair trade practices, but which was rarely applied.³

This contribution describes the naissance of these private complaint procedures, beginning with an analysis of the 1984 New Commercial Policy Instrument. It then compares this instrument with its successor, the 1994 Trade Barriers Regulation, and analyses the first six years of experience under that regulation. It is evident that, compared to its predecessor, the Trade Barriers Regulation provides European industries with a more forceful remedy to combat foreign unfair trade practices. This development is due not so much to changes in the regulation itself, but rather to changes in the international environment in which the European Union operates. Interestingly, however, the majority of private complainants to date have chosen to bring their WTO-related grievances to the European authorities in the traditional way, that is to say, informally. We close this contribution with an analysis of the possible reasons why that is so, and whether the TBR is likely to gain ground.

We must also address here the vexing question of which of the EU institutions or Member States is authorized to initiate WTO litigation against a third country. It is remarkable to see the level of disagreement and uncertainty which surrounds a question of such importance to determining the EU's role in international economic relations. We believe, actually, that the genesis of the TBR provides the answer.

II. HISTORY

The origin of the Trade Barriers Regulation goes back to the early 1960s, when the Commission published a first proposal for a European mechanism to respond to foreign unfair trade practices.⁴

This proposal was inspired in part by a new procedure in US trade law, Section 252 of the Trade Expansion Act of 1962. This provision reflected the frustration of the US Congress that, out of concern for general foreign policy considerations, the Executive failed to enforce aggressively the rights the United States derived from international trade agreements. On Congressional

² The Trade Barriers Regulation ('TBR') is Council Regulation 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization, OJEC 1994 L 349/71.

³ The New Commercial Policy Instrument ('NCPI') 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, OJEC 1984 L 252/1.

⁴ See the Commission's proposal to the Council of 29 November 1963, Bulletin No. 1 – 1964 (Supplement 30).

initiative therefore, the 1962 Trade Act instructed the Executive for the first time to hold public hearings regarding foreign trade barriers at the request of private parties.⁵

In contrast, the European Commission's proposal did not envisage a right for private parties to request the EU authorities to investigate complaints about foreign unfair trade practices. In practice, these differences between the US and the EU did not matter very much. No hearings were ever held under the 1962 Act in the United States; and the European Commission proposal was never adopted.

In 1974 the United States introduced Section 301 in its trade legislation. The rights of private parties were strengthened, as well as the authority of the Executive to take action against foreign unfair trade practices. This time around private parties did use the complaint procedure. Furthermore, the US Executive showed a willingness to ignore GATT obligations and take aggressive unilateral action to protect US interests.

Being a frequent target, the then European Community very quickly voiced considerable discontent about Section 301 complaints. The Community argued that private complaints disrupted traditional diplomatic means of resolving international trade disputes.⁶ The United States ignored these complaints of its trading partners, and continued to refine and sharpen Section 301 in subsequent trade legislation of 1979 and 1984.⁷

In the early 1980s attitudes in the European Community about Section 301 and about private involvement in trade policy proceedings changed. Following suggestions by the European Parliament, France submitted a proposal in 1982 for a procedure similar to Section 301 in the context of a 'relance européenne'.

France laid particular emphasis on the need for a new commercial policy instrument to protect the internal market. The Commission initially resisted the French proposals on the grounds that it had sufficient instruments, in the form of anti-dumping, countervailing duty and safeguard laws, to protect the internal market.

Yet after some time, in 1983, the Commission changed its stance and submitted its own proposals for a new commercial policy instrument. In its proposal the Commission emphasized the potential application of the instrument for the protection of European exports to third countries that encountered unfair trade barriers. The Commission also made provision for private complaints.⁸

⁵ See M. Bronckers, "Private Response to Foreign Unfair Trade Practices: US and EC Complaint Procedures", *Northwestern Journal of International Law & Business* 6 (No. 3, 1984), 651 *et seq.* (671-674).

⁶ Bronckers, see note 5, 674-677.

⁷ Bronckers, see note 5, 677-686.

⁸ Bronckers, see note 5, 716-721.

When adopting the Commission proposal, the Council took great care to distance the New Commercial Policy Instrument from Section 301 in a variety of ways, notably by providing that all actions taken by the Community would have to be compatible with international obligations.⁹ The final regulation still allowed private complaints.¹⁰

III. NEW COMMERCIAL POLICY INSTRUMENT CASE LAW (1984-1994)

The procedure and application of the New Commercial Policy Instrument (NCPI) have been described in detail elsewhere.¹¹ The procedure comprised four administrative phases: a review of admissibility of the complaint, an internal investigation, the international dispute settlement procedure, and retaliation.

The NCPI laid down two tracks, one for Member State complaints and one for private complaints on behalf of the European industry. The first track, for Member States, was never used. Apparently, the Member States felt sufficiently comfortable continuing to channel their requests for GATT dispute settlement proceedings through the ordinary, informal Article 113 EC Treaty (now Article 133) process. The private track of the NCPI was used a bit more often, though not much. In the ten years of the NCPI's existence, the Commission formally considered seven private complaints: it rejected two of them, and initiated investigations in five other cases. Interestingly, four of these seven cases referred to intellectual property disputes.

The following table summarizes the NCPI cases:

⁹ It is notable that, following some 25 years of irritation, the EU finally challenged US Section 301 before a WTO Panel in 1999, with mixed results. See N. McNelis, "Both Sides Consider Section 301 Panel Report a Victory", *Legal Issues of Economic Integration* 27 (2/2000) 185 *et seq.*, and *infra*, text at note 63.

¹⁰ See Article 10(2) and (3) NCPI. Bronckers, see note 5, 723-751.

¹¹ See M. Bronckers, "The Potential and Limitations of the Community's New Trade Policy Instrument", in: Demaret, Bourgeois & Van Bael (Eds.), *Trade Laws of the European Community and the United States in a Comparative Perspective*, 1992, 133 *et seq.*, with references to other literature.

Table summary of NCPI cases:

<i>Case</i>	<i>Initiation</i>	<i>Main area of complaint</i>	<i>Outcome and Duration</i>
United States – Section 337 (a.k.a. the Akzo case)	5 February 1986	Intellectual property	EC prevailed in GATT in 1988; Panel Report ultimately adopted in 1989. US slow to implement, and EC slow to react. Note that on 12 January 2000, the EU requested fresh WTO consultations with regard to this US law. <i>Ongoing.</i>
Indonesia – Sound recordings	21 May 1987	Intellectual property	Settlement in 1988. <i>1 year.</i>
Thailand – Sound recordings	20 July 1991	Intellectual property	Transferred to the TBR, see below.
Japan – Harbour fees	16 February 1991	Goods	Settled in 1993. <i>2½ years.</i>
Turkey – Mass Housing Fund Levy	31 August 1993	Goods	Transferred to the TBR, see below.
Argentina – Export taxes (a.k.a. the Fediol case)	Rejected (decision never published)	Goods	<i>Rejected.</i>
Jordan – Patent protection (a.k.a. the Smith Kline case)	Rejected 1 February 1989	Intellectual property	<i>Rejected.</i>

While numerically this activity does not amount to much, it should be recalled that a number of other cases were resolved under the threat of a formal complaint and investigation. For instance, soon after the NCPI's adoption in 1984, the European producers of Scotch Whisky let it be known that they were considering filing a petition against Bulgaria, for permitting the sale and export of a local liquor under the designation 'Scotch Whisky'. The Bulgarian authorities reportedly intervened, and the controversial sales designation was dropped. Again, there are not many such examples, but they do count as successes of the NCPI.

IV. TRADE BARRIERS REGULATION CASE LAW (1995-EARLY 2001)

The Trade Barriers Regulation (TBR) came into force on 1 January 1995.¹² It took almost two years before European industries started to file WTO complaints under the TBR. Since then, from late 1996 until early 2001, almost 20 cases have been formally investigated.

True to its word, the EU has taken or threatened to take several cases started in the TBR to the WTO – virtually all to at least some positive effect. Because of the rigours of WTO dispute settlement, countries tend to take it seriously. Though they may drag their feet as long as possible, the threat of WTO action brings them to the negotiating table. Efforts to settle seem to accelerate as WTO action becomes more imminent, and if the case goes through WTO dispute settlement, ignoring a contrary ruling comes at a price.

Nevertheless, surveying the TBR legislation and cases thus far, one cannot conclude that the TBR necessarily results in a ‘quick’ resolution of the problem. Even if all goes according to plan, if a TBR complaint goes all the way through the TBR and WTO process, more than three years would transpire from the date of filing until a final decision (including an appeal) is adopted by WTO Dispute Settlement Body.

This may seem a very long time from the perspective of private complainants. Yet this ‘waiting time’ has to be put in perspective. Settlements could arrive earlier on in the process, though experience under the TBR so far suggests that settlements take their time as well. Then again, when compared to most domestic litigation challenging governmental measures (especially legislation), obtaining a final, litigated result in a few years is actually breakneck speed. One must appreciate that a fully-litigated TBR case goes through quite a few phases, some of which are subject to extremely tight deadlines. Consider, for instance, that the WTO Appellate Body has a mere 60, at most 90, days to decide an appeal from a WTO Panel decision on its legal merits – a time frame for appeal which is unheard of in any domestic appellate system. One important lacuna both in the TBR legislation as well as in the WTO process regarding urgent cases is the lack of provisional measures – in cases which merit them, provisional measures could make the unavoidable time lag acceptable, and could spur earlier resolution of disputes.

As far as subject matter goes, the majority of TBR cases have centred around trade in goods. But, as under the NCPI, the industry continues to see this trade policy instrument as helpful in pursuing intellectual property rights, with four out of the 17 new cases concerning intellectual property issues. In fact, industries with experience in GATT and WTO law (such as the music industry and the alcohol industry) seem to have embraced this instrument en-

¹² Council Regulation 3286/94, OJEC 1994 L 249/71.

thusiastically for the help that it can give them. The following table summarizes the TBR cases to date:¹³

Table summary of TBR cases to date:

<i>Case</i>	<i>Initiation</i>	<i>Main area of complaint</i>	<i>Outcome and Duration</i>
Thailand – Sound Recordings	20 July 1991 (under NCPI)	Intellectual property	Suspended. Changes to Thailand's laws, but some indication that changes are not fully satisfactory. <i>Ongoing</i> .
Turkey – Mass Housing Fund Levy	31 August 1993 (under NCPI)	Goods	Settlement at end of 1995, terminated in 1996. <i>3½ years</i> .
USA – Rules of Origin for Textile and Apparel	22 November 1996	Goods	Settlement in 2000. <i>4 years</i> .
USA – Antidumping Act of 1916	25 February 1997	Goods	EU wins at WTO Panel and Appellate Body in 2000. <i>Ongoing</i> .
Japan – Imports of leather	9 April 1997	Goods	Case taken to the WTO in 1998, but EU not currently pursuing it. <i>In limbo</i> .
Argentina – Leather Exports and imports	26 February 1997	Goods	EU wins WTO Panel in 2000, not appealed. <i>Ongoing</i> .
Brazil – Cognac	2 April 1997	Intellectual property	Settled in 2000, with protection of 'cognac' but not its translation. <i>Nearly 4 years</i> .
USA – Copyright Act	11 June 1997	Intellectual property	EU wins WTO Panel in 2000, not appealed. <i>Ongoing</i> .
Brazil – Non-Automatic Import Licensing cases:			
Steel	27 June 1997	Goods	Settled and terminated in 1999. <i>1½ years</i> .

¹³ DG Trade of the European Commission provides a summary of the state of play of all TBR cases at <http://europa.eu.int/comm/trade/policy/traderegul/cases.htm> (visited 28 March 2001). This site also provides references for the publications related to the cases, as well as the non-confidential versions of the relevant investigation reports.

Textiles	27 February 1998	Goods	Settled in 2000 with changes to Brazil's laws and practices, but some indication that changes are not fully satisfactory. <i>Ongoing.</i>
Sorbitol	24 November 1998	Goods	Settled in 2000 with changes to Brazil's laws and practices. Some customs duties raised, but there is a promise to lower them. <i>Ongoing.</i>
Chile – Swordfish	10 July 1998	Goods	Provisional settlement in 2001. <i>2½ years.</i>
Korea – Cosmetics	19 May 1998	Goods	Suspended in 2000 to monitor changes to Korea's laws. <i>Ongoing.</i>
Brazil – Aircraft export subsidies	17 April 1999	Goods	Canada won a case on the same facts in the WTO in 2000, and EU continues to monitor whether it needs to pursue it further. <i>Ongoing.</i>
Canada – 'Prosciutto di Parma'	22 June 1999	Intellectual property	<i>On hold</i> as of 2000 pending outcome of case in Canadian courts.
Korea – Pharmaceutical	30 July 1999	Goods	<i>Suspended</i> in 2000 to monitor changes to Korean laws.
Argentina – Textile	27 November 1999	Goods	Negotiations taking place with Argentina. <i>Ongoing.</i>
Colombia – VAT Legislation On Imported Cars	18 August 2000	Goods	Commission <i>currently</i> conducting examination procedure.
Korea – Subsidisation of shipbuilding industry	2 December 2000	Goods	Commission <i>currently</i> conducting examination procedure.

V. CHANGES AND CONSTANTS IN THE TRADE BARRIERS REGULATION

A. Changes

Compared to the NCPI, the Trade Barriers Regulation incorporates several notable changes, both substantively and procedurally. The following analysis focuses on the position of private complainants.

1. Substance

The TBR's scope of application is more focused. In some, but not all, respects the TBR is stricter in admitting complaints than the NCPI.

a. Legal basis of complaints is more restrictive

Unlike the NCPI, complaints under the TBR can no longer be based on violations of 'generally accepted rules', which covered complaints about international agreements to which the defendant country was not a party or complaints derived from 'soft law'.¹⁴ In contrast, it cannot be excluded that a TBR complaint could still be based on customary international law.

Under the TBR, complaints have to refer to a 'right of action' which the EU can derive from international trade rules.¹⁵ The TBR says that these are 'primarily' rules established in the WTO framework, meaning that other rules can be envisaged as well.¹⁶

There was some debate under the NCPI about whether private complaints could be targeted at 'non-violation' practices of third countries.¹⁷ A non-violation complaint concerns practices which do not constitute outright violations of a GATT/WTO rule, but which negate its intended effect. Under the TBR it is clear that non-violation complaints are admissible.¹⁸ But beyond these 'non-violation' complaints within the context of GATT/WTO, the TBR does not seem to easily admit other complaints about unfair trade practices that cannot be translated into violations of agreed legal obligations. Accordingly, it is

¹⁴ See Article 2(2) NCPI.

¹⁵ See Article 2(1) TBR.

¹⁶ See Article 2(2) TBR.

¹⁷ See J. BOURGEOIS, "EC Rules against 'Illicit Trade Practices' – Policy Cosmetics or International Law Enforcement?" Annual Proceedings Fordham Corporate Law Institute, 1989, Chapter 6, 6-13. See also case 70/87, *Fediol IV*, [1989] ECR 1781, recital 42 (where the Court misread the relevant GATT provisions, Article XXIII (1)(b) and (c), as setting forth only procedural rules). On the concept of non-violation complaints in the GATT, and now the WTO, see E.-U. Petersmann, "Violation and Non-Violation Complaints in Public International Law", German Yearbook of International Law 34 (1992), 175 *et seq.*

¹⁸ Compare Article 2(2) TBR with Article XXIII (1) GATT.

difficult to see how the *Indonesia – Sound recordings* case, prosecuted under the NCPI, could have been admitted under the TBR.¹⁹

While all the WTO agreements are included in the TBR's scope, as are all other multilateral and plurilateral agreements, complaints about obstacles to trade that have an effect on the market of a third country cannot be based on bilateral agreements.²⁰ (TBR complaints alleging effect on the EU market can still be based on bilateral agreements.) This restriction sits uncomfortably, as the EU can certainly derive rights of action from bilateral agreements as well. As will be explained below, this restriction does not reflect a difference in legal appreciation of bilateral agreements, but rather a political concern.

Paradoxically, excluding bilateral agreements leaves EU complainants with restricted options even when it comes to the EU's 'best friends', the Central and Eastern European countries ('CEEC') candidates for future EU membership. With respect to these countries an 'offensive' TBR complaint (alleging an impact on one of the CEEC markets) cannot rest on any of the bilateral agreements the EU has negotiated with them.²¹ The EU is meant to use the dispute settlement provisions of the bilateral agreement in question, where there is no role for private actors.

Even on government-to-government level, these dispute settlement provisions are frankly ineffective, and consequently have almost never been used. For example, the Europe Agreements provide for binding dispute settlement resolution by the Association Council, but the 'defendant' country would also sit on the Association Council, and decisions are made by unanimity. Similarly, such bilateral agreements often provide for referral of disputes to arbitration –

¹⁹ In this case the complaint alleged that the Indonesian government tolerated piracy by private parties and held the Indonesian government to standards contained in international agreements to which it was not a party.

²⁰ See Article 4(1) TBR. Some observers have dismissed this limitation too lightly as mere 'cosmetics'. See H. Beekmann, "The 1994 Revised Commercial Policy Instrument of the European Union", *World Competition* 19 (1995), 53 *et seq.* (68).

²¹ At last count the Community had concluded Europe agreements with Bulgaria, the Czech and Slovak Republics, Estonia, Hungary, Latvia, Lithuania, Poland, Rumania and Slovenia. The EU had concluded Partnership and Cooperation Agreements with Armenia, Azerbaijan, Belarus (not entered into force), Georgia, Kazakhstan, Kyrgyzstan, Moldova, the Russian federation, Turkmenistan (not entered into force), the Ukraine and Uzbekistan. Trade and Cooperation Agreements apply to the EU's relations with Macedonia, Mongolia and Albania. Since neither the Partnership and Cooperation Agreements nor the Interim Agreements are in force for Belarus and Turkmenistan, the predecessor Trade and Cooperation Agreements are currently still applied for those countries too. On 9 April 2001, the EU signed a Stabilisation and Association Agreement with the former Yugoslav Republic of Macedonia. Negotiations toward such an agreement are also ongoing with Croatia. Stabilisation and Association Agreements are a new kind of contractual relationship offered by the EU in return for compliance with the relevant conditions.

but each party must appoint an arbitrator.²² In a rare attempt by the EU to use such dispute resolution, in a dispute with the Ukraine over laws promoting automobile production in the Ukraine under the Partnership and Cooperation Agreement between the EU and the Ukraine,²³ the Ukraine blocked dispute resolution by simply refusing to appoint its own arbitrator.

Such dispute settlement provisions could derive some substance (and meaning for private parties) if they were subject to the TBR's public procedures and time limits. An example is the *Turkey – Mass Housing Levy* case, which was started under the NCPI where the exclusion of bilateral agreements was not yet in place, and finished in the TBR. In that case, the complainant made arguments that Turkey's rules violated, *inter alia*, the EU-Turkey Association Agreement. A satisfactory settlement of that case was achieved.

One might think that at least for those CEEC that are WTO members²⁴ – which is not all of them – TBR complaints could still be based on the WTO. However, there is some doubt as to whether, politically, the EU would be willing to take one of its 'best friends' to the WTO. The upshot is that a complainant would be faced with severely restricted options when it comes to challenging a trade barrier in a future EU member country.

This allegedly was a price that some of the liberal Member States extracted by way of a compromise for, in particular, the right of a single company to bring a TBR action. For instance, it appears that Germany at the time of the TBR's creation had a specific concern. It wanted to limit any tension between the EU and the CEEC, and therefore felt that individual complaints on the basis of the increasing number of bilateral agreements between the EU and these countries ought to be excluded, as such complaints might pollute good political relationships.

If one salutes the ever closer political cooperation between the CEEC and the EU, as these authors would, one can appreciate the concern about 'polluting' a good relationship. At the same time, it is difficult to see why the enforcement of acquired rights, and the involvement of private individuals in their supervision, would necessarily be a pollutant. This is very much part of the EU's tradition, which at least those CEEC which have applied for EU member-

²² See for example the Europe Agreement with Poland, OJEC 1993 L 348/2, at Article 105.

²³ See COM (1999) 390 final.

²⁴ Albania, Bulgaria, Croatia, the Czech and Slovak Republics, Estonia, Hungary, Latvia, Mongolia, Poland, Romania and Slovenia are WTO members. Applicants for WTO membership are: Armenia, Belarus, Lithuania, Macedonia, Moldova, the Russian Federation, the Ukraine, and Uzbekistan. Lithuania concluded negotiations on its membership to the WTO on 2 October 2000. During the session of the WTO General Council held on 8 December 2000 the results of negotiations were confirmed. After the ratification procedure of negotiation documents by the Lithuanian Parliament is completed, Lithuania will be a full WTO member.

ship are obliged to incorporate in their own legal systems as part of the EU's 'acquis'.

Not allowing TBR complaints based on bilateral agreements also undercuts the myriad bilateral agreements the EU is now concluding all over the world, with Egypt, South Africa and Mexico, to name but a few. The lack of effective dispute settlement in past bilateral agreements appears to preoccupy the EU, as it has recently tried to do better. The Free Trade Agreement with Mexico of 23 March 2000²⁵ includes more elaborate dispute settlement provisions, modeled after those of NAFTA.²⁶ The above-mentioned weaknesses have been corrected, and now include short time limits and automatic appointment of arbitrators if one party fails to appoint its arbitrator in time.²⁷ Similarly, EU Trade Commissioner Lamy has recently said that the EU wishes to add binding rules of procedure for dispute settlement to the 1994 EU-Russia Partnership and Cooperation Agreement.²⁸ Allowing TBR complaints on the basis of such agreements would be in line with that approach, and would help to correct the ineffectiveness of the dispute settlement measures certain bilateral agreements currently feature.

In short, we think that the restriction on bringing cases based on bilateral agreements simply has no place in the TBR, and ought to be removed.

b. Government, not private, practices

Contrary to the NCPI, complaints under the TBR also have to target more clearly government practices, i.e., practices that are 'maintained or adopted' by a government.²⁹ Accordingly, it is difficult to attack private practices that are merely tolerated or encouraged by a government. Again, this would have made it difficult to pursue the NCPI's *Indonesia -- Sound recordings* case under the TBR.

Some flexibility in this respect may be available to a petitioning industry and the European Commission when a case is cast as a 'non-violation' complaint in GATT/ WTO terms. After all, such a complaint can even be directed

²⁵ The Interim Agreement with Mexico was transformed into a Free Trade Agreement by Decision 2/2000 of the EC/Mexico Joint Council of 23 March 2000 (covering trade in goods, government procurement, cooperation for competition, consultation on intellectual property rights, dispute settlement) available at http://europa.eu.int/comm/trade/pdf/en2_decision_goods.pdf (visited 27 March 2001).

²⁶ The North American Free Trade Agreement.

²⁷ See Article 44(4) of the EU-Mexico Free Trade Agreement, cited above.

²⁸ See EU Press Release of 30 March 2001, 'Lamy confirms EU support for Russia's bid to join WTO', available at http://europa.eu.int/comm/trade/bilateral/russia/rus_wto.htm (visited 4 April 2001).

²⁹ See Article 2(1) TBR.

against ‘any situation’ that nullifies or impairs, directly or indirectly, the attainment of any objective of a WTO agreement.³⁰

- c. Wider scope of economic activities explicitly included, though complications because of EU ‘mixed competence’

The TBR, being connected to the WTO,³¹ covers a wider area of economic activities than the NCPI. The NCPI was primarily associated with trade in goods, though complaints about inadequate intellectual property protection³² and, in some sense, services³³ were admitted. In contrast, the TBR envisages in so many words complaints in the services area.³⁴ Trade in services is indeed an integral part of the WTO system through the GATS agreement. As intellectual property protection is now part of the WTO system as well, the TRIPS is also clearly covered. As was mentioned above, there have already been three new TBR cases based on the TRIPS.³⁵

What complicates matters though is the European Court’s holding that, in international negotiations, the EU shares competence over most services and intellectual property matters with the Member States.³⁶ As a result, Member States could be more critical about TBR investigations in these areas. This may not seem altogether disadvantageous to EU industries, in the belief that they could persuade individual Member States more easily than the European Commission to act against certain unfavorable third country practices. However, Member States cannot act alone in ‘mixed’ areas either. Furthermore, in whatever action the Member State might attempt, the industries would lose the political clout and retaliatory muscle attached to joint action by the EU. The EU Member State would also be handicapped in that its ability to use or even threaten to use the binding WTO dispute settlement system, without the support of the EU, is seriously in doubt.

Accordingly, in many cases European industries are probably better off by favoring broad EU competence under the TBR. Indeed, there are good reasons in general to favor broader EU competence over matters falling within the WTO’s ambit, not the least of which is the EU’s power when it acts ‘en bloc’.

³⁰ See Article XXIII (1)(c) GATT 1994 and Appendix 1 WTO Dispute Settlement Understanding, and *supra*, text at note 17.

³¹ See Article 2(2) TBR.

³² See the *Indonesia – Sound recordings* case.

³³ See the *Japan – Harbour fees* case.

³⁴ See Article 2(5) and (6) TBR.

³⁵ See M. Bronckers, “The Impact of TRIPS: Intellectual Property Protection in Developing Countries”, CMLREV. 31 (1994), 1245 *et seq.*, which is reproduced in M. Bronckers, *A Cross-Section of WTO Law*, 2000, 185-217.

³⁶ See *Opinion 1/94*, [1994] ECR I-5267. See J. Bourgeois, “The EC in the WTO and Advisory Opinion 1/94: An Echernach Procession”, CMLRev. 32 (1995), 763 *et seq.*

Nevertheless, concerns about national sovereignty and inevitable turf wars have impaired meaningful progress here.

In 1996, the Amsterdam Treaty drafters came up with an unworkable compromise regarding what is traditionally referred to as the 'common commercial policy' of the EU (i.e., the EU's international trade policy). This Treaty merely provided that the Council could, by unanimous decision, extend the EU's competence regarding international trade policy to intellectual property protection and services.³⁷ No such decision was expected anytime soon, and by now this compromise has been superseded by the results of the Intergovernmental Conference held in December 2000 in Nice.

The drafters of the Nice Treaty may appear at first sight to have concocted a more dynamic scheme.³⁸ Unlike in the Amsterdam Treaty, the Nice drafters provided explicitly that the EU has the competence to negotiate and conclude agreements in the field of trade in services and the commercial aspects of intellectual property.³⁹ They also noted that external EU competence regarding intellectual property and services can grow depending, notably, on the internal legislative activities of the EU in these areas.⁴⁰ In reality, this is not much of an advance, since such 'organic growth' was already recognized by the European Court.⁴¹ Furthermore, the Nice drafters were careful to stipulate that these extensions in competence will not necessarily be subject to the majority voting requirement traditionally associated with the EU's common commercial policy: where unanimity is required for the adoption of internal rules, for instance, the Council must also take decisions by unanimity when negotiating and concluding international agreements.⁴² Furthermore, any international agreement concerning trade in cultural, audiovisual, educational, social and human health services shall still require the common accord of the Member States.⁴³ Specific provisions have also been made for transport⁴⁴ and intellectual property; in the latter area, the Council can unanimously decide to move beyond internal harmonization measures, and this exceptionally after consultation of the European Parliament.⁴⁵ Experience in the EU shows that the unanimity requirement easily puts a serious brake on progress in decision-making, and is often paralyzing.

³⁷ See Article 133(5) EC Treaty.

³⁸ See Article 2(8) of the Treaty of Nice, amending Article 133 EC Treaty, as published in OJ 2001, C80/1.

³⁹ See Article 133(5) Nice version.

⁴⁰ *Ibid.*

⁴¹ See ECJ, case 22/70, *AETR*, [1971] ECR 263; *Opinion 2/91*, [1993] ECR I-1061.

⁴² See Article 133(5) Nice version. The Treaty of Nice is expected to enter into force sometime in 2002, upon ratification by all the 15 EU Member States.

⁴³ See Article 133(6) Nice version.

⁴⁴ *Ibid.*

⁴⁵ See Article 133(7) Nice version.

That being said, there are various ways to help construe EU competence under the TBR in such ‘mixed’ areas of competence. For instance, as soon as EU exports of goods or cross-border provision of services are affected, the European Commission can probably claim jurisdiction to investigate complaints about inadequate intellectual property protection in a third country. This helps the Commission to argue that, regardless of any spill over effects, the matter falls within the EU’s traditional and exclusive preserve of ‘common commercial policy’. From this perspective the *Indonesia – Sound recordings* case could still have been pursued under the TBR. Indeed, the European Commission has managed to investigate and litigate a number of intellectual property cases under the TBR, without much concern being raised over its authority to do so. In the *USA – Copyright Act* case, for example, the Commission seems to found its competence in a rather nebulous link to cross-border service provision -- it argued that the US copyright law restricted cross-border music licensing.⁴⁶

EU Member States do not appear to have raised objection to the Commission’s action in such cases. The Member States might indeed be willing to look the other way on competence in an area in which they see TBR action by the Commission as the most effective way to tackle a foreign practice – and this makes sense to us. For example, where a company from a small Member State is faced with a serious barrier abroad, the EU’s negotiation power through the TBR might indeed be the most effective way to address the problem in that particular instance. The Member States ought to go beyond endorsing Commission action tacitly, and should explicitly endorse TBR action in ‘mixed’ areas. This endorsement could be subject perhaps to a different sort of ‘guillotine’ for stopping the Commission from acting, for example something more than a single Member State opposed, but less than the qualified majority the Member States need to stop ‘ordinary’ TBR action. We intend this as a pragmatic solution, in the interest of effectively preserving the rights of the EU and the Member States. We would not suggest that allowing the Commission to act under the TBR in such areas constitute an ‘exercise’ of its powers that would result in an extension of its competence beyond Article 133 EC Treaty as interpreted at any given point in time. Consent could also be granted ‘without prejudice’ to future cases, on a case-by-case basis, and the Commission might take note of such reservation in its TBR decision(s).

⁴⁶ The US Copyright Act included a ‘homestyle exemption’ which allowed shops, restaurants and bars and the like to play music over their speakers for their customers without paying royalties. The Commission concluded that this exception acted as a disincentive to EU performing right organizations to effectively and efficiently license bars, shops, restaurants, etc. in the United States. According to the European Court in Opinion 1/94, *supra* at note 36, cross border service provision is the one services area which falls under the exclusive preserve of the EU.

Such an explicit endorsement could be especially important for cases which now clearly fall outside of the Commission's competence, such as allegations on restrictions of the freedom of providing services by means of establishing a 'commercial presence' in a third country.⁴⁷ Currently, we understand that the Commission simply rejects TBR complaints based on such grounds, meaning that the opportunity for the Commission to act through the TBR in those areas, the opportunity for the Member States to endorse such action, unfortunately does not arise. As mentioned above, Member States are very limited in what they can do alone in mixed areas too. Politically, intervention by a large Member State could get some results – but in particular smaller Member States on their own may not be able to achieve much. Use of the TBR could be the most effective avenue in such a situation.

The application of the TBR may be complicated in another respect, as a result of the division of competence between EU institutions and Member States in WTO matters. Consider the EU's rights under the WTO to retaliate, and notably to cross-retaliate against countries that fail to honor their commitments in the WTO.⁴⁸ It is not self-evident, for instance, that and how the EU can retaliate in the goods sector following a complaint about a third country practice in the area of intellectual property.⁴⁹ Conversely, supposing the European Commission opens a TBR investigation in the goods sector, Member States may object to the Council's resorting to retaliation in the area of intellectual property.

In practice these internal institutional problems of the EU probably ought not be exaggerated. If important European interests are at stake, there must be ways to overcome institutional complications, certainly as far as investigations and settlement discussions are concerned. The Commission's proactive TBR practice to date in the intellectual property area, condoned by the Member States, is encouraging. Solutions may be more difficult at the stage of retaliation, when countermeasures in the EU are being considered. However, retaliation is likely to remain exceptional compared to voluntary compliance or settlement by a third country where an EU complaint is well-founded.

2. Procedurally

a. Complaints by individual companies

Initially, the TBR's most important procedural innovation was the creation of a so-called 'third track'. Next to complaints from Member States and Euro-

⁴⁷ Mode 3 of the GATS.

⁴⁸ See Article 22(3) WTO Dispute Settlement Understanding.

⁴⁹ See P. J. Kuijper, "The New WTO Dispute Settlement System: The Impact on the Community", in: Bourgeois, Berrod & Gippini-Fournier (Eds.), *The Uruguay Round Results: A European Lawyers Perspective*, 1995, 87 *et seq.*

pean industry sectors, the TBR also envisages complaints by individual companies about obstacles to trade having an effect on third country markets.⁵⁰ This is a new right which single companies have already utilized.⁵¹

However, as mentioned above, a political price had to be paid for this innovation – when it comes to laws or practices that hamper the business of EU companies on third country markets, TBR complaints (whether they are brought by a single company or by the Community industry) cannot be based on a bilateral agreement.

And indeed, the right of a single company to bring a TBR complaint is specifically limited to protection of EU exports, not the EU internal market. The TBR has not changed the other private track. Accordingly, only representatives of European industries, and not individual companies, can bring a complaint about foreign trade practices that have an effect within the Single Market. The only TBR case so far that hinted at effects on the EU market was the *Argentina – Leather* case. While it mainly concerned effects on foreign markets (and indeed was brought under Article 4 TBR, which deals with third markets and not the EU market), it also concerned restrictions on the export of hides and their effect on the EU market. The Commission decision remarks: '*Most EC bovine leather tanners have lost market share in a number of Community Member States.*' That would appear to be an issue of effect on the Community market, inadmissible in an Article 4 TBR complaint. Those effects do not appear to have been critical to the Commission's decision to pursue the case however.

The requirement that cases alleging effects on the EU market be supported by the Community industry does not seem to us unduly troublesome. This is also the rule with other trade policy instruments designed to protect the EU's own market, such as the anti-dumping regulation. Where as in anti-dumping industry complaints are allowed, EU action is also conditioned on the complaint being brought by the 'Community industry'. The rationale behind this is that the rest of the Community industry should have a say in what actions are taken by the EU government when it affects the internal market – there may indeed be interests that must be balanced. For example, in a dumping case, a member of the Community industry might also be an importer of the product concerned, and might be affected by, and therefore opposed to, the dumping

⁵⁰ See Article 4(1) and compare Article 3(1) TBR.

⁵¹ The first case brought by a single company was the *Brazil – Non-Automatic Import Licensing* case with regard to Sorbitol, which was brought by the company Cerestar (one of the largest Community producers of Sorbitol). A second one was *Brazil – Aircraft export subsidies*, which was brought by Dornier (the German regional aircraft manufacturer), and a third is *Colombia – VAT Legislation On Imported Cars*, brought by Volkswagen, the German car company.

action.⁵² With regard to the TBR, a case which concerns the Community market, by its very definition, could affect the whole industry. The requirement that a case concerning the EU market be supported by the Community industry helps, along with the Community interest test,⁵³ to ensure that when it comes to the EU market, the fancy of one company cannot take precedence. When it comes to an ‘offensive’ case on the other hand, combating an obstacle to trade on a third country’s market, who in the EU is likely to be bothered by an effort to achieve more opportunities for EU companies abroad?

b. Adverse trade effects instead of ‘injury’

EU exporters no longer have to show that they are ‘injured’ by an illegal foreign trade practice. Instead, they have to demonstrate ‘adverse trade effects’, a lighter version of the injury test.⁵⁴

This is a positive innovation. The NCPI’s requirement that, even where exports were concerned, a private complainant had to show that an illegal trade barrier injured an entire European industry made little sense.⁵⁵ Thus, not all members of a European industry might export, or export to the particular country that posed a problem. Furthermore, once a European exporter has managed to overcome a trade barrier of another country, that barrier starts to protect it as well against its European competitors which have been less successful; the successful exporter may therefore not be inclined to join an industry complaint to the EU authorities against the foreign trade barrier. Accordingly, its stringent injury requirement undoubtedly contributed to the NCPI’s infrequent application.

Even so, exporters must indicate a broader interest for the EU to pursue the matter beyond the losses they suffer individually.⁵⁶ This need not be a considerable hurdle for individual complainants. Raising a point of principle from which other EU industries might benefit as well, if only in the future, should be sufficient.⁵⁷ Indeed, in language which has become almost standard in TBR notices of initiation and decisions, the Commission confirms this:

Moreover, ensuring that WTO partners fully comply with their obligations is of the utmost importance for the Community, which has committed it-

⁵² Note however that a member of the Community industry who is also an importer may be excluded from the definition of the Community industry pursuant to Article 4(1)(a) Council Regulation 384/96 (the EU anti-dumping regulation, OJEC 1996 L 56/1).

⁵³ Incidentally also a feature of anti-dumping law.

⁵⁴ Cf. Article 4(1) with 3(1) TBR.

⁵⁵ For an early critique see Bronckers, *supra* note 5, 735-740.

⁵⁶ See Article 2(4) TBR.

⁵⁷ In that case, the individual complainant will normally also have demonstrated, as must any complainant under the TBR, that a formal investigation is in the Community interest. See Article 8(1) Reg. 3286/94, discussed, *infra*, at note 62.

self to the same obligations. It is fundamental for the good functioning of a multilateral trade system to consistently tackle all allegedly WTO incompatible practices.⁵⁸

c. Transparency

Another important procedural innovation in the TBR's administration was quietly introduced by the Commission in the fall of 2000, when it decided to put flesh on the bones of the Trade Barriers Regulation section of its web site.⁵⁹ The Commission explains cases in detail here, including information about discussions with foreign governments and the non-confidential versions of its investigation reports to the TBR Committee. These reports are substantial documents (in the order of 30 to 50 pages) which lay out the Commission's conclusions following its investigation and include its proposal for action. This welcome level of transparency can be contrasted to the old NCPI regime, where the Commission sometimes did not even publish formal decisions,⁶⁰ let alone internal reports.

This seems to herald a new policy of transparency for DG Trade. Equally quietly, DG Trade has recently started putting the written briefs the EU submits to WTO Panels and the Appellate Body on the internet.⁶¹ We understand that the intention is to do so the day after such briefs are submitted.

B. Constants

Some things did not change in the TBR. The most important constants are fourfold.

1. Legal framework

First, the EU institutions remain bound to observe international law in any action they take under the TBR. Thus, the EU will follow the appropriate inter-

⁵⁸ Commission decision of 17 March 1999 concerning the Brazilian non-automatic import licensing system and its operation, OJEC L 86/22, at para. 24. Another interesting example is the recent notice of initiation in the Colombia – VAT Legislation On Imported Cars case, where the Commission said: '*The principle of national treatment provided for by Article III of the GATT 1994 is one of the most important and basic WTO obligations. If practices like the Colombian one went unchallenged they would constitute an extremely negative precedent for the respect of WTO provisions*', OJEC 2000 C 236/4, para. 6.

⁵⁹ At http://europa.eu.int/comm/trade/policy/traderegul/index_en.htm (visited on 11 March 2001).

⁶⁰ See notably the Commission's decision to reject Fediol's complaint in 1986 against Argentinean taxes in the soybean's sector.

⁶¹ See e.g., first and second written submissions of the EC in FSC case, <http://mkaccdb.eu.int/dsu/doc/ds108-submission1.doc> and <http://mkaccdb.eu.int/dsu/doc/ds108-submission2.doc> respectively (visited 2 April 2001).

national dispute settlement procedures, and will take only those retaliatory measures that conform with international law.⁶² Accordingly, the EU did not bend to pressures to ‘loosen’ the TBR, in ways similar to US Section 301,⁶³ so as to enable a more aggressive use of this instrument.

2. Decision making

Second, the Council seemingly kept a firm grip on the decision-making process under the TBR.⁶⁴ Only the Council is empowered to take retaliatory measures, by qualified majority.⁶⁵ There is even some argument that the Council must affirmatively approve settlement agreements with a third countries,⁶⁶ although thus far the Council has only been indirectly involved in approving settlements, through its possibility of refusing by qualified majority to terminate or suspend a TBR investigation. The Commission holds, rightly in our view, that it does not need a mandate to conclude a settlement agreement with a third country unless it involves the granting of some sort of concession by the EU.

However, the Commission can essentially take all other procedural decisions on its own (such as the initiation of TBR proceedings, the TBR decision to initiate WTO dispute settlement proceedings, the initiation of WTO proceedings, the request to the WTO for authorization to retaliate,⁶⁷ and the suspension or termination of the investigation). Certainly, any Member State can appeal such a decision to the Council. Yet to override the Commission the Council

⁶² See Article 12(2) and (3) TBR.

⁶³ Interestingly, the US Government has gone on record in the WTO to say that it will take no action under Section 301 that is inconsistent with its WTO obligations against another WTO Member. See Panel Report, *United States – Sections 301-310 Of The Trade Act Of 1974*, (WT/DS152/R), adopted on 27 January 2000, at para. 7.114 ff.

⁶⁴ Some clarifying changes to the decision-making process under the NCPI were introduced in 1994. See Council Regulation 522/94, OJEC 1994 L66/10.

⁶⁵ See Article 13(3) TBR. Assuming the Commission has proposed that the Council take retaliatory measures an affirmative vote by a qualified majority of Member States carrying 62 votes is required. Pursuant to the weighted voting system, as adjusted following the accession of the three new Member States, the following number of votes are currently allocated: Belgium 5; Denmark 3; Germany 10; Greece 5; Spain 8; France 10; Ireland 3; Italy 10; Luxembourg 2; Netherlands 5; Austria 4; Portugal 5; Finland 3; Sweden 4; United Kingdom 10. See Article 205 EC Treaty (ex Article 148). Note that voting weights will be changed when the Treaty of Nice enters into force (expected sometime in the year 2002).

⁶⁶ This has been deduced from case C-327/91, *France v. Commission*, [1994] ECR I-3641. See N. Burrows, “No general external relations competence for the Commission”, ELR 20 (1995), 210 *et seq.* (210-213).

⁶⁷ Although the actual decision to retaliate is a matter for the Council.

must act by a special qualified majority.⁶⁸ In other words, rather than the Commission needing a qualified majority to act (as arguably it would under Article 133), the Council needs a qualified majority to block.

The Commission's decision to open an investigation cannot be blocked by a qualified majority of Member States.⁶⁹ Accordingly, for all practical purposes, the Commission continues to play a leading role in administering the TBR.

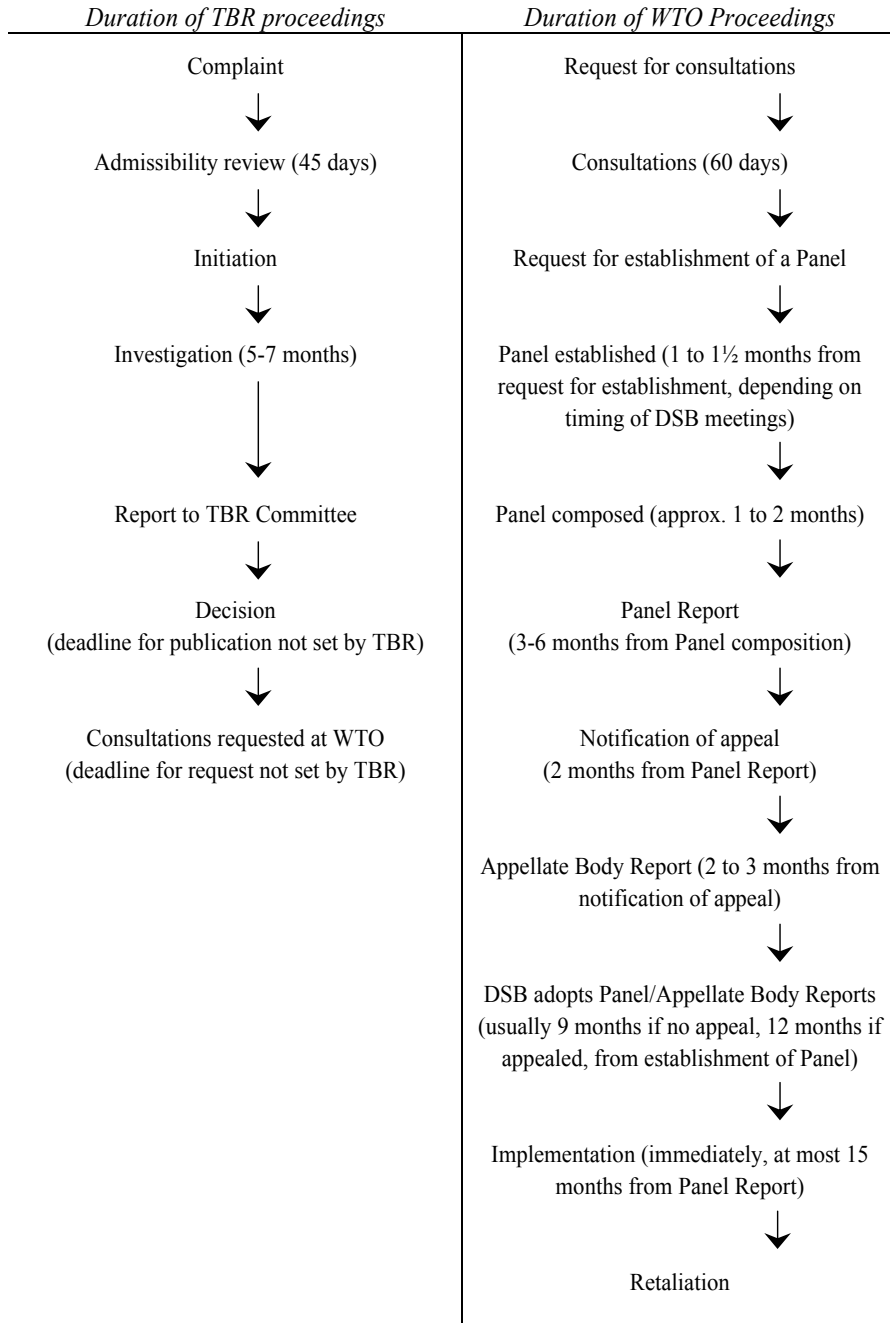
3. *Timing*

Third, the procedure has remained the same, and still comprises four phases: admissibility review, internal investigation, international dispute settlement procedure, review of retaliation. Time limits apply to some of these steps. As these time limits represent an important procedural safeguard for private industries that the Commission will process their complaints diligently, they are indicated in the following table with reference to a WTO-related complaint:

⁶⁸ At least ten Member States have to vote for reversal, and they also have to carry 62 votes or more. On the weighted voting system see, *supra*, note 65.

⁶⁹ See Article 8 TBR. Such decision could possibly be challenged in Court. See *infra*.

Table 3.



The *admissibility review* focuses on whether a complaint contains ‘sufficient evidence’ to justify further examination. If so, and the Commission determines that such an examination is ‘necessary in the interest of the Community’, it will open an examination procedure, generally not later than within 45 days after the complaint or referral was lodged.⁷⁰ Notice of the initiation of such a procedure is published in the Official Journal of the European Communities (‘OJEC’), accompanied by information about the product or service and the countries concerned, a summary of the information received, and an invitation to interested parties to submit information to the Commission.

Conduct of the *examination procedure* shall take between five and seven months, during which time the Commission may, *inter alia*, gather information from persons such as importers, producers and trade associations, as well as from the EU Member States, carry out investigations in the territory of third countries, and hold adversarial hearings. The Commission’s examination will culminate in a report to the Advisory Committee, a body comprised of representatives of each Member State, with a representative of the Commission as chairman.⁷¹ Once the Advisory Committee has received the report, it is now the Commission’s practice to publish a non-confidential version on its web site.

The examination procedure could result in the conclusion that the interests of the Community do not require any action to be taken, in which case the procedure will be terminated. The procedure may also be suspended, in particular where the third country in question takes measures which satisfactorily respond to the concerns raised by the complaint. If, on the other hand, such a satisfactory solution cannot be achieved, the Commission will refer the case to WTO dispute settlement, having consulted the Member States.⁷²

Unfortunately, the deliberations of the Commission and the Member States following the conclusion of the internal examination are not subject to any time limit. Reading the TBR, one might think that the five to seven month time limit for the investigation indicates that a decision would be made in that time frame too. However, cases routinely take far longer than that from the initiation of an examination to the publication of a Commission decision. For example, the *USA – Antidumping Act of 1916* case took 14 months from initiation of the examination procedure to the Commission decision to send the case to the WTO, the *Japan – Imports of leather* case, 13 months, the *Argentina – Leather exports and imports* case, 20 months, and the *USA – Copyright Act* case, 18 months. Furthermore, even once a Commission decision to commence WTO dispute settlement proceedings has been issued, the formal launching of the WTO procedure may take longer than expected – for example, it took the EU seven months to initiate WTO consultations in the *Japan – Imports of leather*

⁷⁰ Articles 5(4) and 6(5) TBR.

⁷¹ Article 8 TBR.

⁷² On the decision-making process see, *supra*, note 68.

case following the decision to take the case to the WTO.⁷³ Here is certainly room for improvement, in the interest of private petitioners.

Once the Commission has brought the case to the WTO, a new set of time limits applies to most, though not all, of the *litigation phases in the WTO*. These time limits were designed to ensure that the time limits governing a US Section 301 procedure could be met. Accordingly, as a general rule a WTO dispute, including an appeal to the WTO Appellate Body should take no longer than 18 months. Furthermore, a country which cannot implement a WTO ruling immediately will normally not be given more than 15 months to do so.⁷⁴ If the losing country misses that deadline, the country having won its WTO case will be entitled, if it wishes, to take retaliatory measures: for example, impose 100% tariffs on imports from the losing country, restrictions on services, or suspensions of intellectual property rights.⁷⁵

In the EU, any decision to impose retaliatory measures would have to be taken by the Council, upon a proposal from the Commission.⁷⁶ There is no time limit imposed on the Commission with regard to when it must submit such a proposal, but once it does so, the Council is to act on it within 30 working days.⁷⁷ If the *FSC* case against the United States is anything to go by, the Commission may take its time to formulate a retaliation proposal. In this case the Commission seems much more interested in obtaining compliance from the United States, without resorting to retaliation. The Commission's strong preference for compliance is welcome; retaliation can have considerable downsides.⁷⁸ It is difficult to design fixed guidelines as to when and whether retaliatory actions are appropriate. For this reason, we do not think it is a priority that the TBR establish time limits for decisions on retaliation.

This analysis leads us to two proposals for improvement of the TBR.

First, the TBR ought to subject the deliberations of the Commission and the Member States following the submission of the internal examination report to a deadline, during which time a decision must be published and, if applicable, consultations requested in the WTO. We believe that two months in ordinary cases should largely suffice, especially given the fact that a referral to the WTO will necessarily involve another round of consultations with the other side.⁷⁹ In the WTO system, the EU would not be required to request the estab-

⁷³ See McNelis ((please check!!! See note 9 ? Please check McNelis: 2000 or 1999 ?)).

⁷⁴ See Article 21 (3) DSU.

⁷⁵ See Article 22 DSU.

⁷⁶ On the decision-making process see, *supra*, text at 65.

⁷⁷ Article 13(3) TBR.

⁷⁸ See, *infra*, text at note 106.

⁷⁹ The Commission's consultations with the other country during the TBR investigation do not count toward the mandatory period (generally 60 days) of WTO consultations (see Article 4.7 DSU).

lishment of a Panel within 60 days from the start of consultations, meaning that these consultations also allow for further internal reflections on the part of the EU authorities. Moreover, moving on to WTO consultations steps up the pressure on the WTO trading partner. In special circumstances, including a formal disagreement between the Commission and Member States about the proper cause of action,⁸⁰ this period could be extended to four months. Adding these time limits would ‘close the loop’ – meaning it would complete and thereby give meaning to the inclusion of time limits in the TBR in the first place. One could then calculate that a TBR proceeding that went through all the steps would take about 8½ months from submission of the complaint to submission of a request for consultations at the WTO.

As far as timing goes, as mentioned above, we believe that the TBR and ensuing WTO process suffer from one major drawback from the perspective of private complainants: there is no provision for interim measures in case of serious or even irreparable injury. The introduction of interim measures in the TBR and WTO certainly merits further reflection, in the interest of meaningful dispute settlement resolution. Interim measures could also, in both the TBR and the WTO, create an incentive for earlier resolution of the case, an incentive which is currently lacking. Without interim measures, there could even be a disincentive to settle, as procrastination could buy time for a country benefiting from a protectionist rule. The threat of interim measures could also have a deterrent effect. We realize however that the EU could not introduce interim measures in the TBR without corresponding provisions in the WTO. This would run afoul of Article XXIII DSU.

Therefore our second proposal is that in the meantime, like the WTO, the EU could add shortened time limits for its internal decision-making in urgent cases, i.e. with respect to admissibility (two weeks instead of 45 days), internal examination (one month instead of five to seven months),⁸¹ internal deliberations and if applicable, a decision and request for WTO consultations (one month instead of our above two to four month proposal). The total for the accelerated TBR procedure would be 2½ months. We are mindful of difficulties shortening the deadlines could create. We think they can be surmounted. Such shorter time limits ought also not apply in cases involving developing countries, if they do not wish them to. Developing countries often do not have the resources to participate in a case in an accelerated fashion.

⁸⁰ See, *supra*, text at note 68.

⁸¹ In fact, the Commission has the power in the TBR to bypass the examination procedure entirely, according to Article 12 (1) TBR, which states ‘*unless the factual and legal situation is such that an examination procedure may not be required.*’

Coupled with the shortened deadlines already applying to WTO dispute settlement in urgent cases,⁸² reducing the TBR procedure to 2½ months could reduce the total time of a TBR/WTO investigation to about 11½ (unappealed) to 14½ (appealed) months.

4. *Judicial review*

The judicial review regime remains unchanged. The Trade Barriers Regulation is meant ‘to ensure the exercise of the Community’s rights under international trade rules, in particular those established under the auspices of the World Trade Organization’.⁸³ In many cases the EU institutions will be called upon to interpret WTO rules at the request of private entities.

Should the institutions give an interpretation that differs from that of the private complainants, or take decisions that are otherwise disagreeable to complainants, it is to be expected that the European Courts will be asked to review these administrative actions.

In this connection it is to be recalled that direct actions against determinations under the TBR will first have to be brought before the Court of First Instance.⁸⁴

a. *Fediol IV*

We have one precedent of judicial review under the New Commercial Policy Instrument. In that case, decided in 1989, the European Court of Justice

⁸² Several attempts to address this concern were made in the WTO to shorten the time limits applicable to regular proceedings in urgent cases, including cases involving perishable goods, see Articles 4(8) and 12(8) DSU, concerning consultations (20 days instead of 60) and the issuance of the Panel Report (three months instead of six), respectively. However, these provisions have hardly been applied. Even if they were, a fully litigated case, including an appeal before the WTO Appellate Body, would still take about a year.

Three cases may be cited in which provisions of ‘urgency’ have been invoked over the lifetime of the GATT: the 1992 request by Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela for the immediate establishment of a panel in accordance with the procedures provided for in paragraph 5 of the 1966 Decision on import measures maintained on fresh bananas by individual member States of the EEC (see EEC – Member States’ Import Regimes For Bananas, Report of the Panel (DS32/R) of 3 June 1993 (not adopted), para. 1); the 1993 request by Chile for consultations on EEC restrictions on imports of apples (see GATT doc. DS39/1; the panel proceeding did not run its full course as Chile later withdrew its complaint upon reaching a mutually satisfactory settlement of the matter with the EC. See EEC – Restrictions on Imports of Apples, Report of the Panel (DS39/R) of 20 June 1994); and the 1994 request by Argentina for consultations on EEC countervailing duties on lemons (see GATT doc. DS45/2).

⁸³ This is the formal title of the TBR.

⁸⁴ See Council Decision 93/350, OJEC 1993 L144/21.

reviewed the European Commission's decision in the *Argentina – Export taxes* case.⁸⁵

The Commission refused to investigate the complaint, on the grounds that each of the GATT arguments proposed by the complainant was unfounded. On appeal, the Court agreed with the Commission. In reaching this result, the Court took decisions with implications extending beyond Fediol's complaint.

The Court paid not much attention to the extra margin of discretion built into the NCPI for the European Commission. Contrary to the anti-dumping and anti-subsidies regulations, after which the new instrument was modelled, it was specifically provided that the European Commission would only open an investigation into a private complaint if it considered this to be in the Community's interest.⁸⁶ This extra hurdle facing a private complainant might have limited the scope for judicial review of the Commission's GATT law interpretations.

The Court might have felt that such interpretations were inspired not just by legal considerations, but also by diplomacy and domestic politicking. While not being so explicit, the Commission had certainly urged the Court not to enter into GATT law. It reminded the Court of its case law denying direct effect to the GATT.⁸⁷

The Court seemingly ignored this complication. It dryly observed that the Commission had refused to investigate Fediol's complaint solely on the grounds that it did not agree with Fediol's legal arguments; not because of a lack of Community interest. Thus, the Court did not deduce from this margin of administrative discretion any limitations on its judicial review of GATT law.

Furthermore, the Court ruled that it could review the Commission's GATT interpretations, notwithstanding its case law on 'direct effect'. The NCPI specifically allowed private complainants to rely on GATT principles, which therefore were open to judicial review. As only practices of foreign governments were tested against GATT principles in NCPI investigations, the Court may have considered judicial review of administrative GATT interpretations more palatable.

The *Fediol* case is still relevant for the practice under the TBR. However, as of yet no Court challenge has been filed against a TBR decision of the Commission.

⁸⁵ See ECJ, *Fediol IV*, *supra*, note 17.

⁸⁶ See Article 6(1) and 3(1) and (2) NCPI.

⁸⁷ See, e.g., case 267-269/81, *SPI/SAMI*, [1983] ECR 801. For a critical review of this case law see E.-U. Petersmann, "Application of GATT by the Court of Justice of the European Communities", *CMLRev.* 20 (1983), 397 *et seq.*

b. Community interest

The new Trade Barriers Regulation has retained the early Community interest test. The Commission must still determine that it is necessary in the interests of the EU to open an investigation.⁸⁸

If the Commission refuses to open an investigation on the grounds that it disagrees with the plaintiff's interpretation of international economic law, there is no reason to assume that the European Courts would not test the Commission's interpretations of WTO and other legal obligations. The recent judgments, in which the Court refused to review EU measures against WTO principles at the request of private litigants and even at the request of a Member State, do not change this.⁸⁹

However, if the Commission were to refuse to investigate a complaint on the grounds that this were somehow contrary to the Community interest, the Courts would exercise more restraint in their judicial review. The Court's traditional formula is that judicial review of the Community interest in trade policy proceedings must be limited to verifying whether the relevant procedural rules have been complied with, whether the facts on which the choice is based have been accurately stated and whether there has been a manifest error of appraisal or a misuse of powers.⁹⁰

It is not easy to conceive of political factors that would militate against an investigation of an injurious trade practice of a third country which is arguably illegal. Expressed differently, can one conceive of any circumstances in which the violation of international agreement by a third country does not even merit a full internal investigation by the European Commission?

Yet, as a TBR investigation continues, further actions by the Commission and ultimately the Council may become more and more sensitive. In each of the

⁸⁸ See Article 8(1) TBR.

⁸⁹ See ECJ, Joined cases C-300/98 and C-392/98 *Parfums Christian Dior SA v Tuk Consultancy BV et al*, Judgment of the Court of 14 December 2000, not yet reported (request of private entity) and ECJ, Case C-149/96 *Portugal v. Council*, [1999] ECR I-8395 (request of Member State). For a penetrating analysis of this case law see N. Van Den Broek, "Legal Persuasion, Political Realism and Legitimacy: The European Court's Recent Treatment of the Effect of WTO Agreements in the EC Legal Order", to be published in *JIEL* 4 (2001). See also CFI, case T-18/99 *Cordis v. Commission*, case T-30/99 *Bocchi Food Trade International v. Commission*, case T-52/99 *T. Port v. Commission*, Judgments of 20 March 2001. In these three judgments the Court of First Instance also dashed the hopes of those who had argued that WTO obligations, once interpreted and found to have been violated by the EU in WTO dispute settlement proceedings, could have a special status in EU law and might be successfully invoked by private individuals in EU court proceedings. The Court of First Instance did not think so (these cases concerned claims for damages against the European Commission following the WTO *Bananas* rulings).

⁹⁰ See, e.g., case C-174/87, *Ricoh v. Council*, [1992] ECR I-1335, para. 68.

different steps taken by EU authorities, the Community interest will have to be taken into account. Consider, for instance, decisions to initiate WTO dispute settlement proceedings and decisions to ask for authorization from the WTO Dispute Settlement Body to take retaliatory measures in case the defendant country held to engage in illegal practices refuses to comply voluntarily with a GATT Panel decision.⁹¹

How the EU institutions will balance the various Community interests (such as foreign policy considerations, effects on the export position of other EU industries in an angry defendant country, effects of retaliatory measures on EU consumers) remains to be seen. Contrary to the anti-dumping regulation, for instance, the TBR does not spell out priorities in how the competing interests ought to be balanced.⁹²

Finally, given that the interests affected under the TBR are likely to be diverse, it is noteworthy that not all potentially affected parties may have sufficient interest to claim standing to sue the EU authorities before the European Courts. Take, for instance, the example of European exporters who are threatened with exclusion from government procurement contracts by a third country which faces retaliatory measures by the EU following a TBR-investigation.⁹³ Given current case law it is doubtful that these exporters would have the standing to request annulment of EU retaliatory measures, imposed by way of a decision or regulation, under Article 230 EC Treaty (formerly Article 173).⁹⁴

VII. THE TBR IS A MORE EFFECTIVE INSTRUMENT

There is no question that the TBR was intended to be a more effective instrument than the NCPI.⁹⁵ To begin with, one can point to a number of im-

⁹¹ See Article 22(2) and (6) WTO Dispute Settlement Understanding.

⁹² Cf. Article 21(1) Council Regulation 384/96 (the EU anti-dumping regulation), OJEC 1996, L 56/1, where it is explained the EU will take action if it is not not in the Community interest.

⁹³ Given that few countries currently are party to the WTO Agreement on Government Procurement ('GPA'), the third country threat may be consistent with its international obligations. The parties to this plurilateral agreement of the WTO, as of March 2001, are Aruba, Canada, the European Community, Hong Kong China, Iceland, Israel, Japan, Liechtenstein, Norway, South Korea, Singapore, Switzerland and the United States. Negotiating their accession to the GPA are Bulgaria, Estonia, Jordan, Kyrgyz Republic, Latvia, Panama; and observer governments are Argentina, Australia, Bulgaria, Czech Republic, Chile, Colombia, Croatia, Estonia, Georgia, Jordan, Kyrgyz Republic, Latvia, Lithuania, Moldova, Mongolia, Panama, Poland, Slovak Republic, Slovenia, Chinese Taipei and Turkey.

⁹⁴ See generally, K. Lenaerts, D. Arts, R. Bray, *Procedural Law of the European Union*, 1999, 157-180.

⁹⁵ The TBR states explicitly: '*the approach followed in [the NCPI] has not proved to be entirely effective.*' (at the 3rd 'whereas'.)

provements in the TBR. Track three has facilitated access of individual companies to the WTO dispute settlement process, though at a price, as no exporter alone, nor the Community industry, can rest a complaint on a bilateral trade agreement between the EU and a third country.⁹⁶ Judicial review in two instances before the European courts of any administrative decisions they take under the TBR is likely to encourage a more careful decision-making process by the EU institutions.⁹⁷ The Commission's recent decision to make the TBR process much more transparent, by putting its investigation and progress reports on the internet, is of considerable interest to complainants and the European industry at large.

At the same time, it has to be recognized that the principal improvement was and remains due to an external factor: the strengthening of the WTO dispute settlement procedure.⁹⁸ Since the NCPI remained within the GATT framework, the NCPI's effectiveness ultimately depended on the effectiveness of GATT dispute settlement. On the whole, the record of GATT dispute settlement has been described as fairly positive.⁹⁹ In international governmental relations following the World War II, it would indeed be difficult to find another Treaty with a better track record of settling, and where necessary, litigating disputes between governments.

Yet from the perspective of a specific European industry considering investing its resources in a NCPI/GATT dispute, an effective remedy for its problems would have appeared elusive. GATT dispute settlement certainly had its quirks, not the least of which was the 'consensus' rule. Though the rule was relaxed over time, there still did not appear to be a straightforward right of a GATT member to request the establishment of a Panel.¹⁰⁰ Furthermore, GATT Panel Reports could only obtain legal force through a consensus decision of all GATT countries, which meant that the losing country could, and regularly did, block or delay adoption of the Report. Moreover, if a country refused to implement a Report, for which no deadlines were set or could be obtained, the

⁹⁶ See text above at n. 42 and following.

⁹⁷ See text above at n. 58 and following.

⁹⁸ See generally D. Palmeter, P. C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure*, 1999, and E.-U. Petersmann, *The Gatt/Wto Dispute Settlement System – International Law, International Organisations And Dispute Settlement*, 1997.

⁹⁹ R. E. Hudec, *Enforcing International Trade Law: The Evolution Of The Modern GATT Legal System*, 1993.

¹⁰⁰ Paragraph F(a) of the Decision of 12 April 1989 on Improvements to the GATT Dispute Settlement Rules and Procedures provided, for instance, that decisions on a request for panel establishment « shall be taken [by the Council] at the latest at the Council meeting following that at which the request first appeared as an item on the Council's regular agenda, *unless at that meeting the Council decides otherwise.* » (emphasis added). Full text of this Decision is available in BISD 36S/61.

GATT Agreement only envisaged that the winning country might retaliate with the authorization of the entire GATT membership, including the country being targeted by retaliation. This threat of retaliation was thus virtually non-existent.¹⁰¹

For the United States, these international legal constraints were no obstacle to pursuing an industry complaint under Section 301 against GATT members, and to taking trade actions against them which arguably were contrary to GATT rules. Yet, in the NCPI, the Community had committed itself to complying with GATT obligations, which meant, for instance, that no European industry could expect the Community to retaliate against another GATT member without the latter's consent. In addition, even if one disregarded retaliation, the Community had no record of aggressively pursuing its GATT rights. For instance, in the one case which went through NCPI and GATT dispute settlement proceedings, and which was won by the European Community early on,¹⁰² the Community authorities abstained from taking any action when the United States failed to implement the GATT ruling to the satisfaction of European industry. Unsurprisingly, against this background the NCPI/GATT system did not inspire much confidence in European industry circles as a means to remove foreign trade barriers.

All of this has now changed. The WTO dispute settlement is more rigorous than its predecessor. For instance, the 'consensus' rule has been reversed, and now WTO dispute settlement moves forward automatically absent a consensus against moving forward; the proceedings have become more legalized, with stricter deadlines; the threat of retaliation is now real.¹⁰³ Thus, various European industries are presently paying 100% extra import duties in the United States, affecting trade of some 350 million euros, following the finding that the EU failed to properly implement WTO rulings in the *Bananas* and *Hormones* disputes. Yet these retaliatory measures have not dampened the enthusiasm of the EU to enforce its rights in the WTO vigorously. The EU has become the second most active user, after the United States, of the WTO dispute settlement system, which overall has already processed more cases in the first five years since the WTO's entry into force on 1 January 1995 than the GATT in its almost fifty years of existence.¹⁰⁴

¹⁰¹ The GATT authorised retaliation only once. See GATT 1st Supp. BISD 32 and 62 (1953) (authorising the Netherlands to retaliate against U.S. restrictions on dairy products).

¹⁰² This was the Akzo case about US Section 337, mentioned the table summary of NCPI cases above.

¹⁰³ See Articles 22(2) and (6) and 26 of the WTO Dispute Settlement Understanding.

¹⁰⁴ Between January 1995 and February 2001, 223 dispute settlement cases were initiated in the WTO. Of these, the EU has been a party (excluding its participation as a third-party) in a total of 101 disputes — in 56 cases as complainant, and in 45 cases as defendant. This is close

Obviously, the point of a TBR action for the complaining industry is not for the EU to take retaliatory measures. Such measures do not themselves remove the foreign government's disputed measures. Furthermore, they easily inflict damage on European industries and consumers who depend on imported goods or services, and who are not at all implicated in the disputed foreign government measure. Indeed, Commissioner Pascal Lamy, who is presently responsible for the EU's external trade policy, has shown that he is no great fan of retaliation even when the EU has won a case in the WTO. He, rightly,¹⁰⁵ maintains that compliance is both the immediate and ultimate goal of WTO dispute settlement, and has done so in regular prose as well as poetry. Commissioner Lamy's 'Hymn to Compliance' goes as follows:

Consult before you legislate
 Negotiate before you litigate
 Compensate before you retaliate
 and comply – at any rate.¹⁰⁶

Accordingly, 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. Yet the fact that the threat of retaliation by the EU has become real,¹⁰⁷ and the overall perception that the European authorities are taking the

to one half of the total. This figure already exceeds the level of EC involvement throughout the lifetime of GATT in which a total of 196 Article XXIII cases were initiated. (See *GATT, Analytical Index: Guide to GATT Law and Practice*, 6th edition 1995, 772–787). Of those cases, the EC was involved in 72 — in 28 of them as complainant and in 44 as defendant. This latter statistic does not cover cases brought under the Tokyo Round MTN Codes.

¹⁰⁵ Pascal Lamy has thus taken a clear, political stance in a protracted legal debate on the nature of the WTO's obligations. See M. Bronckers, "More Power to the WTO?", *JIEL* 4 (2001), 41 *et seq.* (59-61).

¹⁰⁶ See Commissioner's Lamy's Speech to the U.S. Chamber of Commerce, *Has international capitalism won the war and lost the peace?*, Washington DC, 8 March 2001, posted on the European Commission's web site (we last visited this link on 28 March 2001) http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=SPEECH/01/112|0|RAPID&lg=EN

¹⁰⁷ Currently the EU is threatening the United States with retaliatory measures for failing to implement the WTO ruling in *FSC*. The EU claims it is entitled to subject some 4 billion euros of US imports to 100% tariff increases, dwarfing the volume of European trade being subject to US retaliatory duties following the *Bananas* and *Hormones* disputes. See *United States – Tax Treatment for 'Foreign Sales Corporations'* (WT/DS108/1), Panel Report of 8 October 1999 and Appellate Body Report of 24 February 2000, *European Communities – Measures Affecting Meat and Meat Products (Hormones)* (WT/DS26 and WT/DS48), Panel Report of 18 August 1997 and Appellate Body Report of 16 January 1998; *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (WT/DS27), Panel Report of 12 April 1999 and Appellate Body Report of 9 September 1997.

WTO process and industry interests much more seriously than in the past is likely to render the TBR a more effective weapon for European industries to remove foreign obstacles to trade.

VIII. THEN WHY IS THE TBR NOT YET THE PREFERRED INSTRUMENT?

On paper, therefore, the TBR has a lot to offer private complainants that want to bring their grievances to the WTO: procedural guarantees even for an individual complainant providing more control over the process, time limits, a well-defined decision-making machinery which gives the Commission substantial power to admit, investigate, settle or litigate a complaint in the WTO, judicial review of various decisions the Commission might take under the TBR and, increasingly, transparency. Yet it took private industry almost two years to bring the first WTO-complaint under the TBR. And even now, looking at the statistics for the years 1995 to 2000, nearly 90% of the cases brought by the EU in the WTO have not originated through the TBR, but through complaints brought to the Commission's attention informally, by Member States and private interests.¹⁰⁸ It is therefore pertinent to ask whether, in reality, the TBR is genuinely more attractive for the European industry.

That European industries took some time before they started using the TBR does not say much about the TBR's effectiveness. One can think of a couple of reasons to explain this delay in 'take off'. Industries, like their governments, had to go through a learning curve in order to understand what the WTO held in store for them. It took time to grasp the implications of the entire package of WTO agreements, which is evolving,¹⁰⁹ and has only gradually en-

¹⁰⁸ As explained above, 17 complaints have so far been lodged by the private sector on the basis of the TBR (two more have been completed under the TBR, but were started under the NCPI). Of these, the EU has so far initiated an action in the WTO in seven cases, *Argentina – Measures on the Export of Bovine Hides and the Import of Finished Leather* (DS155); *Brazil – Measures on Import Licensing and Minimum Import Prices* (DS183); *Chile – Measures Affecting the Transit and Importation of Swordfish* (DS193); *Japan – Tariff Quotas and Subsidies Affecting Leather* (DS147); *United States – Anti-Dumping Act of 1916* (DS136); *United States – Section 110(5) of the US Copyright Act* (DS160); and *United States – Measures Affecting Textiles and Apparel Products* (DS151). This figure represents just 12.5% of the 56 WTO cases initiated by the EU so far. In one other case, the EC simply participated as a third party in an already initiated dispute. See *Brazil – Export Financing Programme for Aircraft, complaint by Canada* (DS46).

¹⁰⁹ For instance, another agreement with great potential for private business entered into force in February 1998, this being the WTO negotiations on basic telecommunications services. See M. Bronckers, P. Larouche, "Telecommunications Services and the World Trade Organization", JWT 31 (1997), 4 *et seq.*, 101-153. **((PLEASE CHECK STARTING PAGE!!!))**

tered into full force.¹¹⁰ It was not known at the beginning just how effective WTO dispute settlement would be, and consequently how popular it would become. Furthermore, the TBR obviously suffered from the bad reputation of its predecessor, the New Commercial Policy Instrument. In business circles this petition mechanism, if remembered at all, was generally viewed as being ineffective.

But there are other reasons why the TBR was not immediately embraced by European industry. Traditions die hard. For years, industry brought their grievances about other countries' trade measures to the Commission's attention through Member States, industry federations or in-house public affairs officers. These cases were seen, by the 'old GATT hands' within government and industry, as being imbued with politics, lending themselves to negotiation rather than litigation. This perception created a culture in which lawyers and legal processes were usually frowned upon as 'complicating' and 'expensive' factors, with insufficient sensitivity towards the political reality of international relations.

By now, however, several years into the existence of the WTO, one can distinguish a new generation of government officials, as well as industry experts, who are well aware that WTO rights are enforced and, if need be, litigated largely on the basis of legal arguments. Political considerations are obviously important, but they inform, rather than replace legal processes. A good knowledge of WTO rules and processes therefore has become indispensable to evaluate an industry's, as well as the EU's, position in respect of the WTO. This certainly has reduced the resistance in Europe to involving lawyers in obtaining WTO-related benefits for industry.¹¹¹ It has also rendered the advantages of the TBR more visible. Still, this cultural change has not yet led to a measurable increase in TBR cases compared to informal complaints.

It is apropos then, to examine some of the arguments still advanced in favor of bringing WTO-related complaints to the Commission's attention informally rather than through the TBR. The most frequently-heard points are summarized below, accompanied by our comments on them:

1. First, there is the matter of expense. One advantage of an informal complaint might seem that the Commission perhaps is willing to assume much of the burden of drafting the legal arguments and collecting the

¹¹⁰ For example, the TRIPS only entered fully into force for developing countries on 1 January 2000. See Article 65(2) TRIPS.

¹¹¹ Similarly, before, private lawyers were admitted with considerable difficulty in GATT Panel proceedings; now their participation in WTO litigation is routine. See M. Bronckers, J. H. Jackson, "Editorial Comment: Outside Counsel in WTO Dispute Processes", *JIEL* 2 (1998), 155 *et seq.*

evidence, thereby saving the private industry the expenditure on internal and external resources.

The expense advantage cannot be excluded. In our experience, however, even if a complaint is brought to the Commission's attention informally, the industry bringing the issue is normally expected to flesh out its WTO arguments in considerable detail, and should be prepared to research Commission questions, provide market studies, etc.

Furthermore, if the non-confidential versions of the TBR investigation reports are anything to go by, the Commission is very thorough in investigating a TBR case. The Commission is required to prepare a written report of its investigation within a certain time frame, and these reports tend to be substantial documents, complete with economic and legal analysis. On the informal road, a 'complainant' has no guarantee that the resources will be allocated to such an investigation. Investment in the preparation of a complaint can be relatively minimal in comparison to what the Commission is prepared to commit when it embarks on an examination procedure.

Moreover, it should also be kept in mind that if the Commission agrees to hold the pen in drafting and substantiating a complaint, the Commission will naturally want to include more of its own perspectives and filters as well in the case.

2. Some companies may be concerned about repercussions in a foreign country, if they are seen to be taking the lead in a WTO-related complaint brought under the TBR. An informal complaint might then seem more advantageous, if their anonymity can be guaranteed.

This is a valid point worth considering before choosing the informal route or the TBR. It should then also be taken on board, though, that there may be cases where a sufficient level of anonymity can be guaranteed if a TBR-complaint is brought by an industry federation to which the company belongs. If that were possible, then the company would only need to consider the other pros and cons of a formal TBR versus an informal complaint.

3. One other supposed advantage relates to the internal decision-making process of the Commission. If the Commission pursues an informal complaint, it is argued that it could act more quickly, as it is not bound to the time limits prescribed in the TBR (45 days for admissibility review, five to seven months for the internal investigation.)¹¹²

¹¹² Although nothing in the TBR says that the Commission cannot advance on these deadlines. Indeed, in the recent *Korea – Shipbuilding* case, the Commission has said informally that it plans to finish its investigation and submit its report in less than five months.

Furthermore, if the Commissioner whose services have processed the complaint wants to put his intention to initiate WTO litigation to a vote in the college of the Commissioners, he can do so through the so-called ‘oral procedure’.¹¹³ This means that his proposal need not be translated first in all the official languages, which easily takes up another six weeks. In contrast, such translations are required in a so-called ‘written procedure’, whenever a Commissioner presents a proposal to the college of Commissioners following a formal procedure, as is the TBR practice.¹¹⁴

Except for very unusual cases, which are both legally easy and enjoy very strong political support throughout the EU, our experience suggests that informal complaints easily take up a considerable amount of time as well. What a complainant gains in using the TBR – not least, some procedural certainty – easily outweighs the minimal time savings that could come in some cases.

One important reason for delay in informal cases is the open-ended consultation process between Commission services. To appreciate this, one has to realize that in a complaint brought against a third country quite a few Commission services become involved: in DG Trade, the regional desk (e.g., North America), the unit with technical expertise (e.g., TRIPS), the unit dealing with WTO/TBR cases,¹¹⁵ another DG having responsibility for the complaining industry (e.g., DG Telecommunications or DG Industry), and the Legal Service, which will ultimately be called upon to plead the case in the WTO. An informal complaint is not administered according to a well-defined procedure, with a clear objective, and subject to time limits, as the TBR is. This leaves more room for opportunist or ‘hobbyist’ arguments as well as turf wars in the inter-service process of looking at an informal complaint. Accordingly, it can take quite a bit of time and effort for a private industry to keep the informal process on track, and a TBR complaint can help DG Trade to cut through inter-service conflicts.

¹¹³ Essentially, the European Commission can take a decision according to three procedures: (i) the ‘oral’ procedure, where a Commissioner simply asks the President to include a certain item on the weekly agenda of the Commissioners, and where decisions will be taken by majority vote; (ii) the ‘written procedure’, where no vote is taken, provided all Director-Generals involved as well as the Legal Service are in agreement, and no Commissioner raises an objection, and (iii) delegation of management or administrative measures, where one of the Commissioners or a Director-General or Head of Service can take a decision alone. See generally, the Rules of Procedure of the Commission, OJ 2000, L308/26.

¹¹⁴ See Article 12, Commission’s Rules of Procedure, *id.* There is now discussion to abolish this elaborate translation requirement, and to limit translations of the Commission’s internal working documents to English and French, which would obviously save time.

¹¹⁵ Even if the informal complaint is not brought under the TBR, the DG Trade officials having WTO litigation experience will study the case.

Often, by the time it becomes clear that the informal route is actually going to take longer than the TBR would have, a number of months have already passed, and the ‘complainant’ hesitates even more to then start over with the TBR process. Obviously, it would then have saved time if the TBR had been used from the outset.

4. Proponents of the informal scenario also point out that the difference in the Commission’s decision-making power, described above,¹¹⁶ is theoretical. (To summarize, we have pointed out that for the Commission to act informally, it must seek the approval of at least a qualified majority of the Member States. Meanwhile, in the TBR, the tables are turned: the Commission can act on its own, except when it comes to retaliation, and there must be a qualified majority of Member States to block its action.) Some argue that the distinction drawn by us is irrelevant, since the Commission will consult the Member States in any event, even under the TBR, and will be loath to initiate WTO proceedings if not supported by a very large majority of them.

It is certainly true that, as a practical matter, the Commission will always try to garner support from the Member States before taking offensive action in the WTO, even through the TBR. It would simply be bad politics for it not to do so. Having said that, the question remains whether the Commission would be entitled to pursue a case before the WTO if there were a divergence of views amongst the Member States.

Both law and experience suggest that in those circumstances the Commission would be freer to pursue a TBR case than an informal complaint. For instance, an informed observer of the *Brazil – Aircraft export subsidies* case has described how Dornier, a German aircraft manufacturer, first brought an informal complaint to the Commission’s attention. When a number of Member States indicated that they would oppose any move against Brazil¹¹⁷ (implying that a decision to litigate would not win qualified majority support), Dornier filed a TBR complaint. Dornier reasoned that these Member States would not have the qualified majority to block such a decision under the TBR.¹¹⁸

¹¹⁶ See, *supra*, text at note 68.

¹¹⁷ Apparently, these were Member States that hosted companies which, as subcontractors of the allegedly subsidised Brazilian aircraft producer, depended on the continued success of the Brazilian aircraft producer Embraer.

¹¹⁸ See J. Ch. Van Eeckhaute, “Private Complaints Against Foreign Unfair Trade Practices – The EC’s Trade Barriers Regulation”, *JWT* 33 (1999), 199 *et seq.* (211). Whether Dornier achieved all that it hoped is another matter, as it did not get a Commission decision to take the case to the WTO. However, in the TBR, Dornier obtained a full investigation and an investigation report which indicated that if Brazil did not implement the WTO ruling which

5. Then there are those proponents of the informal route, mostly Commission officials, who say the argument that the Commission can act more easily through the TBR than informally is mistaken. When push comes to shove, they argue, the Commission could even take a case to the WTO if all the Member States were against it. In support of this position they cite the management functions attributed to the Commission by the Treaty.¹¹⁹ In their view the initiation of WTO dispute settlement proceedings concerns neither the opening of negotiations nor the conclusion of international agreements.¹²⁰ As might be expected, the Council, out of concern for its own role and respect for Member State interests, does not share this point of view at all.

Clearly, the Commission could only consider exercising this ‘management function’ in bringing a case to the WTO on the basis of an informal complaint, as the TBR provides for a specific decision-making procedure, involving both the Member States and the Commission.¹²¹ Now imagine the Commission initiating WTO dispute settlement proceedings on the basis of an informal private complaint, in the face of opposition from a large number of Member States. These Member States will likely not sit idle. As a political response, they might try to make life a bit more difficult for the European Commission in other files. This the Commission will anticipate before going to the WTO, and may therefore give some pause to at least some Commissioners, who might wonder whether a private complaint is worth a political row with Member State governments.

Furthermore, the offended Member States might also consider legal action. Anticipating internal unrest within the Commission, the Member States might, for instance, scrutinize whether the Commission really did comply with its own decision-making procedures in reaching a controversial conclusion. Such challenges before the European Court of Justice have been successful in the past, and can therefore not be dismissed out of hand.¹²² Conceivably, offended Member States or the Council could decide as well to attack the Commission head on, arguing that it does not have the power to initiate WTO action independently – a fight which the Commission would probably wish to avoid at all

struck down the export subsidies, the EU would act. This undoubtedly stepped up the pressure on Brazil in a way that informal talk would not have.

¹¹⁹ See Article 211 (formerly 155) EC Treaty.

¹²⁰ See Article 300 (formerly 228) EC Treaty.

¹²¹ See, *supra*, text at note 64ff. ((please check !!!))

¹²² See, e.g., ECJ, case C198/97, *Commission v. Germany*, judgment of 8 June 1999, not yet published.

costs.¹²³ There is a question as to whether such an action for annulment would be admissible, as one could argue that the Commission decision to initiate WTO proceedings is not an challengeable ‘decision’ within the meaning of Article 249 (ex Article 189 EC Treaty).¹²⁴ However, on the merits this attack would be rather powerful, precisely in light of the TBR.

When the Commission submitted its first draft for the NCPI in early 1983, it sought broad delegated powers from the Council to manage the Community’s international trade policy.¹²⁵ The Council cut back on the Commission’s wishes, and ultimately a carefully crafted compromise was worked out. Pursuant to this compromise decision-making machinery, the Commission obtained considerable authority to investigate and litigate complaints about unfair trade practices in the GATT through the NCPI, albeit subject to the ‘guillotine’ of a qualified majority of the Member States opposed. On the other hand, the Council retained authority to take retaliatory decisions under the NCPI as well as other decisions regarding the exercise of the Community’s rights under international trade agreements, on a proposal from the Commission.¹²⁶ The Council maintained the NCPI’s decision-making machinery in the TBR, with respect to the prosecution of WTO-related complaints.¹²⁷ While appreciating an ‘evolutionary

¹²³ See notably the powers *attributed* to the Commission in Article 211 (1) and (3) EC. Absent a specific mandate from the Council or authorization by (a qualified majority of) the Member States, it would be more difficult for the Commission to claim that it has *delegated* powers to initiate WTO dispute settlement proceedings.

¹²⁴ At first sight, it would be easier for the Council or Member States to attack a Commission decision *not* to initiate WTO litigation than the other way around. In the former scenario, the Commission’s decision appears to be more final, thereby creating ‘legal effect’ for the litigious-minded Member States or the Council. In contrast, a decision to initiate WTO proceedings is, it could be argued, only a beginning and not the end.

Then again, once the Commission has decided lawfully, for argument’s sake, to initiate WTO dispute settlement proceedings, it is difficult to see when and on what grounds the Council or the Member States could intervene thereafter to block an actual ruling. Furthermore, the initiation of WTO litigation may well produce a variety of effects for the EU as an institution as well as individual Member States. Consider, for example, the possibility that the defendant of the Commission’s claim turns around and initiates a counterclaim, exposing certain Member States or the EU to the risk of illegality of some of their measures, and retaliatory restrictions if they do not amend the measures held to violate WTO law. Note in this connection that, as a matter of WTO law, third countries which impose retaliatory restrictions on European imports can elect to exclude imports originating in certain European countries from the effects of these sanctions. In the *Bananas* dispute, for instance, the United States imposed no retaliatory restrictions on imports from the Netherlands. Thus, the interests and risks of individual Member States may vary.

¹²⁵ COM Doc (83) 87 def.

¹²⁶ See Bronckers, see note 5, 726-733.

¹²⁷ See, *supra*, text at 64ff. ((please check !!))

development' of the law, it would be revolutionary to think that, without any legislative amendment, this compromise has now become obsolete. Accordingly, the argument that on the basis of Article 211 the Commission can initiate WTO litigation independently as a mere 'management decision', without the support, or even disregarding the wishes, of a qualified majority of the Member States, strikes us as untenable.¹²⁸

We also note that the Commission has rarely pursued its claims to independent 'management authority' in the face of strong opposition. One situation where the Commission has gone to bat, and we think with good reason, concerned inaction of the Council or the Member States.¹²⁹ Yet, as a matter of principle, it would be difficult for the Commission to accuse the Council of inaction where the initiation of WTO litigation is concerned. The Council adopted the NCPI as well as the TBR for the very reason of streamlining the internal decision-making process in the EU preparing for WTO litigation. The TBR allows the Commission to overcome decision-making paralysis, when no qualified majority amongst the Member States can be found to bring a complaint about an unfair foreign trade practice to the WTO.¹³⁰ A single company, or a single Member State complaint can then 'launch' the Commission towards the WTO, and only the common front of a qualified majority of the Member States could stop this 'missile'. In those rare cases where such a qualified majority of Member States would be willing to stand up together and block the Commission from bringing a complaint to the WTO, which the Commission after examination has found to be meritorious, one can hardly criticize these Member States for being 'inactive'.¹³¹

What all this means for a private industry with a WTO-related complaint is that bringing this complaint informally to the European Commission can be fraught with uncertainty, if a number of Member States become strongly opposed to WTO litigation. Industry needs to be much less concerned about this in a TBR procedure.

¹²⁸ We do not think the Commission would find an ally in the European Court of Justice. A related example: ECJ, Case C-159/96 *Portugal v. Commission* [1998] ECR I-7379, where the successful applicant, Portugal, contested the Commission's broad interpretation of its delegated powers in an area of international trade, covered by Article 113 (now Article 133 EC Treaty).

¹²⁹ See, e.g., ECJ, case 325/85 *Ireland v. Commission*, [1987] ECR 5041. Note though that here the Commission lost its case.

¹³⁰ In accordance with the EU's ordinary process of trade policy-making under Art. 133 EC.

¹³¹ These Member States are bound to be criticized by European industry for squandering the acquired rights of the EU under the WTO or international trade law generally. This is likely to make the respective national governments think quite actively before they stop the Commission from going forward with a complaint to the WTO.

For the time being, this seems an acceptable distribution of powers between the Commission and the Member States in initiating the WTO dispute settlement process. Taking into account the current stage of the EU integration process, as well as the variety of interests involved, this arrangement allows the EU to operate effectively in this particular area of international relations.¹³² In particular, we see no need to propose that the Commission, on the basis of an informal complaint, be able to start WTO litigation independently, by-passing the TBR process and ignoring the concerns of any and all Member States. The TBR process contains some guarantees that the Commission properly examines a complaint; that interested parties, including the Member States, can make their voices heard before the Commission takes a decision; that Commission decisions are subject to judicial review as well as some political checks and balances; and that the TBR process is relatively transparent.

What we could envisage, though, is the power for the Commission to initiate a TBR proceeding on its own initiative, in the absence of a complaint.

6. Informal complaints to the Commission can still be useful

Apart from helping to preserve the anonymity of a complainant, if need be, presenting complaints informally to the Commission remains a useful way for industry to ‘test the waters’ within the Commission about a potential WTO problem. We would recommend that potential ‘complainants’ start by talking to DG Trade. It should not matter which service of DG Trade is first approached. The Commission has eliminated the game of mailboxes, where the outside world needed ‘expert advice’ simply to establish which ‘guichet’ was competent to receive a particular private submission. Since September 2000, as part of other welcome developments we have signaled above, DG Trade is establishing a ‘one stop shop’ principle for the private submission of WTO-related complaints. Once a particular service within DG Trade has been approached by industry about a foreign unfair trade practice, it becomes a matter of internal house-keeping for the Commission to ensure that this complaint is properly addressed by all the competent services. This is in line with modern standards of administrative behavior, which the Commission has committed to observe as an institution.¹³³

Having studied a draft complaint, the Commission services may suggest to complainants to initiate a TBR procedure, or give comfort that an informal

¹³² The role of the EU as an actor in international relations is still fledgling. See K. Lenaerts, E. De Smijter, Eddy, “The European Union as an Actor under International Law”, *Yearbook of European Law 1999-2000*, 2000 **((Please check starting page !!))**.

¹³³ See the ‘Code of Good Administrative Behaviour for Staff of the European Commission in their Relations with the Public’, attached to the Commission’s Rules of Procedure cited, *supra*, at note 113.

complaint will also end up in the WTO following an informal process. In the latter case, it is up to the complainant to assess the likelihood and timing of success.

CONCLUSION

Private parties are the real guardians of the international trade agreements that the EU signs with third countries. They are the ones with the vested interests, and hence they are the most vigilant in highlighting the transgressions of third countries. Providing some way for private parties to latch on to the powerful WTO dispute settlement system was and is essential. The TBR does that.

Numerically, the statistics do not yet show that the TBR is perceived as the most effective way for the European industry to challenge third country infringements of agreements with the EU. Our analysis suggests, however, that this perception is ripe for reconsideration. We expect that the TBR will be more frequently used, as its advantages compared to bringing almost any complaint informally to the European Commission are hard to ignore. The professionalism of government officials and industry experts dealing with trade and other WTO matters also militate in favor of an increased role for the TBR.

We do suggest some improvements. For example, we consider that excluding from the TBR complaints based on bilateral agreements is wrong, and we think this restriction ought to be lifted.¹³⁴ We have some suggestions on time limits too. One of the gaps in the TBR is that the deliberations of the Commission and the Member States following the conclusion of the internal examination are not subject to any time limit. Neither is there any time limit on how long it should take from a Commission decision to a request for consultations in the WTO. Those gaps ought to be closed, and more – the Commission should consider special time limits for urgent cases, and both the EU and the WTO should consider introducing provisions for interim measures.¹³⁵

Furthermore, we have urged the EU, its institutions and Member States to accept clarity in the EU's decision-making process with regard to bringing cases to the WTO. From a European industry perspective, it is disheartening to see that there are even disagreements between the institutions, and even within institutions, as to competence.

It is clear that under the TBR, the Commission has the power to go forward to the WTO absent a qualified majority of Member States opposed. However, outside of the TBR, there is disagreement as to whether the Commission has the power, pursuant to its 'management' functions,¹³⁶ to go it alone, or whether it needs the support of a qualified majority (or in some cases, unanim-

¹³⁴ See text accompanying note 20ff above. ((Please check: *et seq.* ?))

¹³⁵ See text accompanying note 80ff above. ((please check: *et seq.* ?))

¹³⁶ Article 211 EC Treaty.

ity) in the Council. We find the notion that the Commission could proceed independently, absent even the tacit support of the Member States, even faced with their opposition, to be unsustainable. We do not think that the Court would support this, especially in light of the compromise from which the NCPI was born. Moreover, we see no need for the Commission to have the power to start WTO litigation independently, bypassing both the TBR and the Member States.¹³⁷ We therefore propose that EU public officials bury the hatchet and focus more attention on other countries' problems and trade barriers. In our view, the TBR constitutes an excellent instrument for the EU to obtain results.

Consistent with this view, we have also proposed that Member States explicitly endorse the Commission prosecuting complaints under the TBR in areas of 'mixed competence' between the EU and the Member States, i.e., with regard to most services and intellectual property issues for the time being. Again, this would be conducive to obtaining the best results for the EU and European industries under the WTO. After all, the Member States have no power to initiate WTO litigation against third countries in these areas in any event.

As before, however, the TBR will remain dependent on its environment. That is, our prediction about the TBR's future may be proven wrong, if a WTO new round does not fulfill its promise, if the WTO suffers a fatal blow. Here, too, however, we are prone to optimism. We are hopeful that the WTO will flourish; we have confidence in the WTO's resilience in the face of adversity. After all, the WTO's predecessor, the GATT, was also written off once too often. There is too much at stake now, in an era of deficient global governance, to allow the WTO to fall apart.

¹³⁷ See text accompanying note 132 above.

