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## A Comparative Study on the Trade Barriers Regulation and Foreign Trade Barriers Investigation Rules

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A COMPARATIVE STUDY ON THE TRADE BARRIERS REGULATION AND FOREIGN  
TRADE BARRIERS INVESTIGATION RULES

by

JUNRONG SONG

(Under the Direction of Professor Daniel Bodansky)

ABSTRACT

The *Trade Barriers Regulation* and *Foreign Trade Barriers Investigation Rules* are enacted in the European Union and China respectively. Both of them establish a procedure for the private sector to petition the government to challenge foreign trade barriers. Through the comparative study on the two pieces of law, this paper intends to dig out the similarities and differences between them and develop some suggestions for the improvement of them.

INDEX WORDS: Trade Barriers Regulation, Foreign Trade Barriers Investigation Rules,  
Obstacles to trade, Trade barriers, European Union, China

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TRADE BARRIERS INVESTIGATION RULES

by

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of the Requirements for the Degree

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## Chapter I. Introduction

Since the development of international trade theory,<sup>1</sup> trade barriers have been the most enduring foci in the area of international trade law. As is known to all, trade liberalization promotes global prosperity and welfare. However, the incentive to be free riders in the process of trade liberalization tempts almost all countries to maintain some kind of trade barriers, which gives rise to numerous disputes among these nations. The settlement of such disputes is within the domain of public international law, where only States have standing.<sup>2</sup> However, the private sector and the public authorities could form an ad-hoc partnership in the fight against foreign trade barriers so as to promote the accomplishment of their respective objectives.<sup>3</sup> By establishing a legal procedure for the private sector to petition their government to challenge foreign trade barriers, the *Trade Barriers Regulation*<sup>4</sup> (hereinafter TBR) in the European Union

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<sup>1</sup> ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 260-362 (J.R.M'ulloch ed., Edinburgh : A. and C. Black and London : Longman, Brown, Green, & Longmans 1850) (1776); DAVID RICARDO, PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 108-27 (E.C.K Conner ed., G. BE.U. & Sons, Ltd. 1911) (1817).

<sup>2</sup> In WTO dispute settlement system, independent customs territories like Hong Kong also have standing to file a complaint.

<sup>3</sup> GREGORY C. SHAFFER, DEFENDING INTERESTS—PUBLIC-PRIVATE PARTNERSHIPS IN WTO LITIGATION 12-18, 33 (2003).

<sup>4</sup> 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, 1994 O.J. (L349) 71 (EC), as amended by Council Regulation 356/95 of 20 February 1995, 1995 O.J. (L041) 3 (EC). For the similarities and differences between the TBR and its U.S. counterpart-Section 301 of the Trade Act of 1974, please refer to Professor Shaffer's book at *supra* note 3.

and the *Foreign Trade Barriers Investigation Rules*<sup>5</sup> in China are aimed to forge such partnership.

This paper will undertake a comparative study on the two pieces of law in the following aspects: Chapter two provides an overview of the laws, including their background, aims, scope and decision-making, etc. Chapter three examines the procedure from lodging a complaint to carrying out an investigation. Substantive requirements are explored in Chapter four. Chapter five discusses the outcome of the investigation and follow up actions or measures. This is followed by an introduction of judicial review available for the complainants and other persons concerned. An overview and evaluation of the implementation of the law is taken up in Chapter seven. The paper ends up with some suggestions on the improvement of the law.

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<sup>5</sup> Dui Wai Mao Yi Bi Lei Diao Cha Gui Ze [Foreign Trade Barriers Investigation Rules] (promulgated by the Ministry of Commerce, Feb. 2, 2005, effective Mar. 1, 2005) LAWINFOCHINA (last visited Mar. 15, 2006) (P.R.C.).

## Chapter II. An Overview

### A. *Trade Barriers Regulation*<sup>6</sup> in the European Union

As a key element of the EU Market Access Strategy,<sup>7</sup> the TBR is unique among the Community's commercial policy instruments because of its offensive nature.<sup>8</sup> It is aimed at opening third country markets for European exporters rather than merely defending the Community market.<sup>9</sup> The TBR is a successor of the *New Commercial Policy Instrument*<sup>10</sup> (hereinafter NCPI) in which the Community industry was allowed for the first time to lodge a complaint with the Commission about an unfair foreign trade barrier. Under the TBR, the private rights were further strengthened with the addition of Community enterprises as

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<sup>6</sup> Council Regulation 3286/94, *supra* note 4.

<sup>7</sup> The Market Access Strategy was introduced in 1996, which marked a transition in the E.U. from a defensive trade policy to a proactive and aggressive trade policy. See Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions, *The Global Challenge of International Trade: A Market Access Strategy for the European Union*, COM (1996) 53 final (Feb. 14, 1996).

<sup>8</sup> Apart from other commercial policy instruments like anti-dumping and safeguards measures, the TBR is aimed to remove obstacles to trade which have an effect on third countries market as well as on the Community market.

<sup>9</sup> See Council Regulation 3286/94, *supra* note 4, at art. 1.

<sup>10</sup> 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, art. 3, 1984 O.J. (L252) 1(EC).

complainants.<sup>11</sup> With big improvements, the TBR is designed to be more effective than its predecessor – the NCPI.<sup>12</sup>

The TBR covers obstacles to trade in goods as well as services.<sup>13</sup> In practice, measures on trade related intellectual property are also the target of TBR.<sup>14</sup> The Council shall decide on the adoption of commercial policy measures.<sup>15</sup> The Commission shall decide on all the other issues, including the initiation, suspension or termination of TBR proceedings, and initiation, conduct or termination of international consultation or dispute settlement procedures.<sup>16</sup> Upon the request of Member States, the Commission decisions may be revised by the Council by a qualified majority.<sup>17</sup> Overall, the Commission plays a leading role in the administration of the TBR.<sup>18</sup>

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<sup>11</sup> Council Regulation 3286/94, *supra* note 4, at art. 4. For the difference between the “Community industry” and “Community enterprise”, please refer to the definitions of them contained in the article 2.5 and 2.6 of the TBR.

<sup>12</sup> Council Regulation 2641/84, *supra* note 10.

<sup>13</sup> Council Regulation 3286/94, *supra* note 4, at art. 2.

<sup>14</sup> *See* Commission Notice of Initiation of an Examination Procedure Concerning an Obstacle to Trade, within the Meaning of Council Regulation (EC) No 3286/94, Consisting of Trade Practices Maintained by Canada in relation to Certain Geographical Indications for Wines, 2002 O.J. (C124) 6; Commission Notice of initiation of an Examination Procedure Concerning an Obstacle to Trade, within the Meaning of Council Regulation (EC) No 3286/94, Consisting of Trade Practices Maintained by the United States of America in Relation to Cross-border Music Licensing, 1997 O.J. (C177) 5.

<sup>15</sup> Council Regulation 3286/94, *supra* note 4, at art. 13.3.

<sup>16</sup> *Id.* at art. 13.1, 13.2.

<sup>17</sup> *Id.* at art.14.4.

<sup>18</sup> Marco Bronckers & Natalie Mcnelis, *The EU Trade Barriers Regulation Comes of Age*, 35(4) J. OF WORLD TRADE 427, 444 (2001).

## **B. Foreign Trade Barriers Investigation Rules<sup>19</sup> in China**

The People's Republic of China adopted "opening up" policy in the late 1970s and has already gained tremendous development in the area of foreign trade.<sup>20</sup> In the international market, Chinese products are very competitive, with relatively low prices. Therefore, Chinese products have become the most frequent target of anti-dumping measures adopted by trade partners. According to the statistical data released by the World Trade Organization (hereinafter WTO) Committee on Anti-Dumping Practices, there were 411 anti-dumping investigations initiated against Chinese products from January 1, 1995 to December 31, 2004.<sup>21</sup> In the meantime, Chinese products are confronted with various trade barriers set up by foreign countries that wish to protect their domestic market. Having adopted a defensive strategy for a long period, the Chinese government decided to turn the scale by resorting to a more offensive trade policy instrument. Consequently, the *Provisional Rules for the Investigation of Foreign Trade Barriers*<sup>22</sup> was promulgated in September 2002 by the former Ministry of Foreign Trade and Economic Cooperation.<sup>23</sup> Unfortunately, no investigation has ever been initiated under it.<sup>24</sup>

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<sup>19</sup> Foreign Trade Barriers Investigation Rules, *supra* note 5.

<sup>20</sup> See XIAOLAN FU, EXPORTS, FOREIGN DIRECT INVESTMENT AND ECONOMIC DEVELOPMENT IN CHINA, 45-46 (2004); Chengyan Lu, *Legal Services in China: Facing the WTO*, 20 UCLA PAC. BASIN L.J. 278, 282(2003).

<sup>21</sup> Anti-Dumping Initiations: By Exporting Country, [http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_statabl\\_e.pdf](http://www.wto.org/english/tratop_e/adp_e/adp_statabl_e.pdf) (last visited Mar. 15, 2006).

<sup>22</sup> Dui Wai Mao Yi Bi Lei Diao Cha Zan Xing Gui Ze [Provisional Rules for the Investigation of Foreign Trade Barriers] (promulgated by the former Ministry of Foreign Trade and Econ. Cooperation, Sep. 23, 2002, effective Nov. 1, 2002) LAWINFOCHINA (last visited Mar. 15, 2006) (P.R.C.).

<sup>23</sup> The former Ministry of Foreign Trade and Economic Cooperation was incorporated into the current Ministry of Commerce in March 2003. They are both branches within the State Council. Currently, the Ministry of Commerce is the authority in charge of foreign trade in China.

<sup>24</sup> Legislation on Foreign Trade Barriers in China, <http://gpi.mofcom.gov.cn/aarticle/xxfb/a/200504/20050400034765.html> (last visited Mar. 15, 2006).

A bigger change occurred in July 2004 with the amendment of the *Foreign Trade Law*,<sup>25</sup> which is the basic law immediately below the Constitution governing foreign trade in China. In a newly inserted chapter entitled “Foreign Trade Investigation”, foreign trade barriers are listed among the issues for investigation.<sup>26</sup> In three articles, this short chapter concisely provides the authority, the methods of investigation, obligation of publication and confidentiality of state secrets and commercial secrets.<sup>27</sup> In the following year, the Ministry of Commerce, as the authority in charge of foreign trade, promulgated the *Foreign Trade Barriers Investigation Rules*<sup>28</sup> in order to implement the relevant provisions in the *Foreign Trade Law*.<sup>29</sup> The Rules provide the procedure in detail for the investigation of foreign trade barriers.

Like the TBR, the *Foreign Trade Barriers Investigation Rules* covers obstacles to trade both in goods and services.<sup>30</sup> The Ministry of Commerce is the decision-making body under the Rules.<sup>31</sup> It designates the Bureau of Fair Trade of Import and Export, one of its branches, for the implementation of the Rules.<sup>32</sup>

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<sup>25</sup> Dui Wai Mao Yi Fa [Foreign Trade Law] (promulgated by the Standing Comm. Nat’l People’s Cong., May 12, 1994, amended by the Standing Comm. Nat’l People’s Cong., Apr. 6, 2004, effective Jul. 1, 2004) 2004 STANDING COMM. NAT’L PEOPLE’S CONG. GAZ. 4 (P.R.C.).

<sup>26</sup> *Id.* at art. 37-39.

<sup>27</sup> *Id.*

<sup>28</sup> Foreign Trade Barriers Investigation Rules, *supra* note 5.

<sup>29</sup> Foreign Trade Law, *supra* note 25, at art. 37-39.

<sup>30</sup> Foreign Trade Barriers Investigation Rules, *supra* note 5, at art.3.

<sup>31</sup> *Id.* at art. 2.

<sup>32</sup> *Id.*

### C. Comparison

Both of the two pieces of law were enacted in line with the trade policy transition from defensive to offensive in the EU and China. They share the same objective, namely, removing unfair trade barriers so as to expand exportation.<sup>33</sup> They both cover obstacles to trade in goods and services.<sup>34</sup> The question of whether the measures on trade related intellectual property shall be covered is answered by the TBR practice, but it is still unclear under the *Foreign Trade Barriers Investigation Rules*.

One problem with the *Foreign Trade Barriers Investigation Rules* is that its status is too low. In China, the Constitution is at the top of the hierarchy of law.<sup>35</sup> The second tier is the law enacted by the National People's Congress and its Standing Committee.<sup>36</sup> This is followed by regulations issued by the State Council.<sup>37</sup> The fourth tier is the local law and regulations issued by the local People's Congress and its Standing Committee.<sup>38</sup> Local rules issued by the local government are at the lowest tier.<sup>39</sup> In addition, the regulations issued by the departments of State Council have the same status as the local rules issued by local government.<sup>40</sup> The relationship between the regulations issued by the departments of State Council and local law

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<sup>33</sup> Foreign Trade Barriers Investigation Rules, *supra* note 5, at art.1; Council Regulation 3286/94, *supra* note 4, at art. 1.

<sup>34</sup> Foreign Trade Barriers Investigation Rules, *supra* note 5, at art.3; Council Regulation 3286/94, *supra* note 4, at art. 2.1.

<sup>35</sup> Li fa fa [Law on Legislation] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 2000, effective July 1, 2000) art. 78, 2000 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 112 (P.R.C.).

<sup>36</sup> *Id.* at art. 79.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at art. 80.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at art.82. When conflict exists between the two, the State Council shall determine which of them prevails. *See Id.* at art. 86.3.

and regulations issued by the local People's Congress and its Standing Committee is not clearly defined. It is up to the State Council and the Standing Committee of National People's Congress to resolve the conflict that might exist between the two.<sup>41</sup> The *Foreign Trade Barriers Investigation Rules* is promulgated by the Ministry of Commerce, one of the departments of the State Council.<sup>42</sup> Therefore, its status is lower than the Constitution, laws and regulations issued by the State Council. Accordingly, it has to concede when conflict occurs between it and any of the three sources of law in the higher hierarchy. In contrast, the other two most frequently used trade policy instruments- anti-dumping and countervailing measures- are governed by regulations issued by the State Council.<sup>43</sup> This reflects that foreign trade barrier investigations have not yet been deemed as important as anti-dumping and countervailing measures.

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<sup>41</sup> *Id.* at art. 86.2.

<sup>42</sup> Foreign Trade Barriers Investigation Rules, *supra* note 5.

<sup>43</sup> Fan Qin Xiao Tiao Li [Anti-Dumping Regulation] (promulgated by the St. Council, Nov. 26, 2001, amended by the St. Council, Mar. 31, 2004, effective June 1, 2004) LAWINFOCHINA (last visited Mar. 15, 2006); Fan Bu Tie Tiao Li [Countervailing Regulation] (promulgated by the St. Council, Oct. 31, 2001, amended by the St. Council, Mar. 31, 2004, effective June 1, 2004) LAWINFOCHINA (last visited Mar. 15, 2006).

## Chapter III. Procedure

### A. *Trade Barriers Regulation*<sup>44</sup> in the European Union

#### 1. Lodging of a complaint

There are three types of complainants under the TBR,<sup>45</sup> namely, the Community industry, the Community enterprise and the Member States.<sup>46</sup> The complaint should be in written form and submitted to the Commission.<sup>47</sup>

A complaint on behalf of the Community industry must contain sufficient evidence for the existence of “obstacles to trade that have an effect on the market of the Community”<sup>48</sup> and of the “injury resulting therefrom.”<sup>49</sup> This avenue represents the defensive side of the TBR.<sup>50</sup>

The complaint on behalf of Community enterprises must contain sufficient evidence for the existence of “obstacles to trade that have an effect on the market of a third country”<sup>51</sup> and of the “adverse trade effects resulting therefrom.”<sup>52</sup> This track represents the offensive side of

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<sup>44</sup> Council Regulation 3286/94, *supra* note 4.

<sup>45</sup> *Id.* art. 3, 4, 6.

<sup>46</sup> *Id.* at art. 3, 4, 5.

<sup>47</sup> *Id.* at art. 3.1, 4.1, 5.1.

<sup>48</sup> *Id.* at art. 3.1.

<sup>49</sup> *Id.* at art. 3.2.

<sup>50</sup> Jean Charles Van Eeckhaute, *Private Complaints against Foreign Unfair Trade Practices: The EC's Trade Barriers Regulation*, 33(6) J. OF WORLD TRADE 199, 201 (1999).

<sup>51</sup> Council Regulation 3286/94, *supra* note 4, at art. 4.1.

<sup>52</sup> *Id.* at art. 4.2.

the TBR.<sup>53</sup> Nevertheless, such a complaint is admissible only if the obstacle to trade alleged therein is the subject of a right of action provided in a multilateral or plurilateral trade agreement.<sup>54</sup> Therefore, the Community enterprises are excluded from lodging complaints based on bilateral agreements between the Community and third countries.<sup>55</sup>

The Member States may lodge a complaint in both of the situations mentioned above.<sup>56</sup> The complaint filed by the Member States must contain sufficient evidence regarding the “obstacles to trade and of any effects resulting therefrom.”<sup>57</sup>

To date, only one investigation has been based on a complaint lodged on behalf of Community industry.<sup>58</sup> Three investigations have been based on complaints lodged on behalf of Community industry and enterprises together.<sup>59</sup> All the other investigations have been based on complaints lodged on behalf of Community enterprises, among which only three have been

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<sup>53</sup> Eeckhaute, *supra* note 50, at 203.

<sup>54</sup> Council Regulation 3286/94, *supra* note 4, at art. 4.1.

<sup>55</sup> See Bronckers, *supra* note 18, at 434-45; CROWELL & MORING, INTERIM EVALUATION OF THE EUROPEAN UNION'S TRADE BARRIERS REGULATION 79-80 (2005), [http://trade-info.cec.eu.int/doclib/docs/2005/october/tradoc\\_125451.pdf](http://trade-info.cec.eu.int/doclib/docs/2005/october/tradoc_125451.pdf) (last visited Mar. 15, 2006).

<sup>56</sup> Council Regulation 3286/94, *supra* note 4, at art. 6.1.

<sup>57</sup> *Id.* at art. 6.2.

<sup>58</sup> Commission Notice of Initiation of an Examination Procedure Concerning an Obstacle to Trade, within the Meaning of Council Regulation (EC) No 3286/94, Consisting of Subsidies Afforded by the United States of America to Oilseed Production, 2003 O.J. (C58) 3.

<sup>59</sup> Commission Notice of Initiation of an Examination Procedure Concerning an Obstacle to Trade, within the Meaning of Council Regulation (EC) No 3286/94, Consisting of Trade Practices Maintained by Korea Affecting Trade in Commercial Vessels, 2000 O.J. (C345) 5; Commission Notice of Initiation of an Examination Procedure Concerning an Obstacle to Trade within the Meaning of Council Regulation (EC) No 3286/94, Consisting of the — Brazilian Export Financing Programme PROEX, 1999 O.J. (C108) 33; Commission Notice of Initiation of an Examination Procedure Concerning an Obstacle to Trade, within the Meaning of Council Regulation (EC) No 3286/94, Consisting of Trade Practices Maintained by Chile in Relation to the Transit and Transhipment of Swordfish in Chilean Ports, 1998 O.J. (C215) 2.

lodged by companies themselves while the others have been filed by associations representing enterprises.<sup>60</sup> Complaints filed by the Member States have never happened.<sup>61</sup>

## 2. Commission's decision on admissibility

Normally, the Commission shall make a decision on the initiation of a Community examination procedure within 45 days of the lodging of the complaint.<sup>62</sup> This period may be suspended at the request, or with the agreement, of the complainant.<sup>63</sup> There are two elements the Commission shall consider before making a decision, namely, whether the evidence is sufficient and whether the initiation of an examination procedure is “necessary in the interest of the Community.”<sup>64</sup> In order to provide the Commission with consultations on the decision-making, an Advisory Committee consisting of representatives of all the Member States is set up pursuant to the TBR.<sup>65</sup> The Commission's decision of initiating an examination procedure shall be announced in the *Official Journal of the European Communities*.<sup>66</sup>

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<sup>60</sup> All the investigations are listed in the annex.

<sup>61</sup> *Id.*

<sup>62</sup> Council Regulation 3286/94, *supra* note 4, at art. 5.4.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at art. 8.1.

<sup>65</sup> *Id.* at art.7.

<sup>66</sup> *Id.* at art. 8.1(a).

### 3. Investigation and report to Member States

The investigation is carried out at the Community level.<sup>67</sup> There are several ways to gather and verify the information. The Commission shall request information from all relevant economic operators and organizations who give their consent.<sup>68</sup> Where necessary, the Commission shall carry out investigations in the territory of third countries, which have been officially notified and expressed no objection within a reasonable period.<sup>69</sup> Upon request, the Member States shall supply the Commission with all information necessary for the investigation.<sup>70</sup> The Commission may hold a hearing upon the written request of the parties concerned.<sup>71</sup> Furthermore, the Commission shall, on request, give the parties primarily concerned an opportunity to be confronted with each other for verification of information.<sup>72</sup> During the investigation, confidential information shall be accorded with special treatment.<sup>73</sup> Upon conclusion of the investigation, the Commission shall report to the Committee.<sup>74</sup> Normally, the investigation shall end within five months of the announcement of initiation of the procedure, which could be extended to seven months due to the complexity of the examination.<sup>75</sup> In practice, the average period of investigations is nine months.<sup>76</sup>

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<sup>67</sup> *Id.* at art. 8.1(c).

<sup>68</sup> *Id.* at art.8.2(a).

<sup>69</sup> *Id.* at art.8.2(b).

<sup>70</sup> *Id.* at art. 8.3.

<sup>71</sup> *Id.* at art.8.5.

<sup>72</sup> *Id.* at art.8.6.

<sup>73</sup> *Id.* at art. 8.4(a).

<sup>74</sup> *Id.* at art. 8.8.

<sup>75</sup> *Id.*

<sup>76</sup> CROWELL & MORING, INTERIM EVALUATION OF THE EUROPEAN UNION'S TRADE BARRIERS REGULATION 104 (2005), [http://trade-info.cec.eu.int/doclib/docs/2005/october/tradoc\\_125451.pdf](http://trade-info.cec.eu.int/doclib/docs/2005/october/tradoc_125451.pdf) (last visited Mar. 15, 2006).

As trade barriers tend to become ever more complicated, the investigation has become increasingly important.<sup>77</sup> Within the rule-oriented WTO dispute settlement mechanism, the more detailed facts one country collects, the more possibility for the country to win the case.<sup>78</sup>

#### **4. The procedural rights of industry or enterprises as complainants**

Under the TBR, complainants are fully involved in every stage of the investigation and have broad procedural rights.<sup>79</sup> They are entitled to have their complaints duly examined as regards the sufficiency of evidence.<sup>80</sup> If the complaints are found admissible, an investigation shall be initiated on the allegations of the complaint.<sup>81</sup> Complainants have the right to inspect non-confidential information and be informed of the result of the procedure.<sup>82</sup> Moreover, they can resort to judicial review when they disagree with decisions of the Commission.<sup>83</sup> Once a trade barrier is found to exist, the complainants are guaranteed that action shall be taken against it.<sup>84</sup>

Moreover, the importers or exporters concerned, other than the complainants, also have certain procedural rights. They have the right to inspect the non-confidential information that is used in the examination procedure and is relevant to the protection of their interests.<sup>85</sup> They

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<sup>77</sup> Eeckhaute, *supra* note 50, at 205.

<sup>78</sup> SHAFER, *supra* note 3, at 46-47.

<sup>79</sup> Eeckhaute, *supra* note 50, at 206.

<sup>80</sup> Council Regulation 3286/94, *supra* note 4, at art.5.4.

<sup>81</sup> *Id.* at art.8.

<sup>82</sup> *Id.* at art. 5.3, 8.1(a), 8.4(a).

<sup>83</sup> Treaty Establishing the European Communities, art. 230, Nov. 10, 1997, 1997 O.J. (C340) 3 [hereinafter EC Treaty] .

<sup>84</sup> Council Regulation 3286/94, *supra* note 4, at art.12.

<sup>85</sup> *Id.* at art.8.4.

also have the right to be heard by the Commission provided that they prove that they are primarily concerned with the result of the procedure.<sup>86</sup>

## **B. Foreign Trade Barriers Investigation Rules<sup>87</sup> in China**

### **1. Filing a complaint**

Complaints can be brought either by domestic enterprises, industries or any individual, legal persons or other entities on behalf of them.<sup>88</sup> The complaint shall be in written form and include the following information:<sup>89</sup> (1) name, address and related information of the complainant;<sup>90</sup> (2) the description of measures or practices concerned;<sup>91</sup>(3) the description of the products or service that the measures or practices concerned aim at;<sup>92</sup> (4) a general description of relevant domestic industries;<sup>93</sup> (5) a description of negative impacts if the measures or ways applied for investigation have caused negative impacts;<sup>94</sup> (6) other content that the complainant deems it necessary to include.<sup>95</sup> Complainants are also required to provide evidence of the existence of the measures or practices and the negative impact caused thereby.

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<sup>86</sup> *Id.* at art.8.5.

<sup>87</sup> Foreign Trade Barriers Investigation Rules, *supra* note 5.

<sup>88</sup> *Id.* at art. 5.

<sup>89</sup> *Id.* at art.6.

<sup>90</sup> *Id.* at art.7.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

If the complainant cannot submit the materials, it does not necessarily lead to the rejection of the complaint. However, the complainant should explain the reason in written form.<sup>96</sup>

Moreover, the Ministry of Commerce also can self-initiate investigations against foreign trade barriers as it deems necessary.<sup>97</sup>

The only investigation so far was initiated upon a complaint filed by Jiangsu Province Laver Association.<sup>98</sup>

## 2. Examination of the complaint

The Ministry of Commerce shall examine complaints and make a decision on whether or not to initiate an investigation within 60 days from the receipt of the complaints.<sup>99</sup> If the complaint meets the requirement of the form and content, the Ministry of Commerce shall initiate an investigation thereby and publish a corresponding announcement, which shall include the measures or practices under investigation, the products or services relating to the measures and practices under investigation, the alleged country (region), and the time limit for the interested parties to set forth their opinions and the public to make comments.<sup>100</sup> The complainant is entitled to be informed of the Ministry of Commerce's decision to initiate an investigation.<sup>101</sup> The Ministry of Commerce may make a decision not to initiate an

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<sup>96</sup> *Id.* at art.8.

<sup>97</sup> *Id.* at art.4.

<sup>98</sup> The Ministry of Commerce Announcement No. 16, 2004, Initiation of an Investigation on Japan Restriction Measures of Laver Importation (Apr. 22, 2004), <http://www.mofcom.gov.cn/aarticle/b/e/200404/20040400212097.html> (last visited Mar. 16, 2006).

<sup>99</sup> Foreign Trade Barriers Investigation Rules, *supra* note 5, at art.10.

<sup>100</sup> *Id.* at art.12,13.

<sup>101</sup> *Id.* at art.14.

investigation in one of the following circumstances: (1) the complaint is apparently inconsistent with the facts;<sup>102</sup> (2) the materials submitted by the complainant are incomplete and the complainant does not provide supplementary materials within the time limit set by the Ministry of Commerce;<sup>103</sup> (3) the measures or practices involved are obviously not a trade barrier as defined;<sup>104</sup> or (4) other circumstances that the Ministry of Commerce deems unnecessary to initiate an investigation.<sup>105</sup>

### 3. Investigation

There are several ways for the Ministry of Commerce to carry out an investigation. It may collect the information itself.<sup>106</sup> It may establish an expert consultation group consisting of relevant departments of the State Council, experts and scholars it deems necessary for the investigation on technical and legal issues.<sup>107</sup> It may seek information from the interested parties through questionnaires or hearings.<sup>108</sup> When it deems necessary, the Ministry of Commerce may also send staff to the country (region) concerned to collect information upon the agreement of its government.<sup>109</sup> During the investigation, the Ministry of Commerce may request consultation with the country (region) concerned.<sup>110</sup> The investigation shall be

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<sup>102</sup> *Id.* at art.16.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at art.19.

<sup>107</sup> *Id.* at art.20.

<sup>108</sup> *Id.* at art.21.

<sup>109</sup> *Id.* at art.22.

<sup>110</sup> *Id.* at art.25.

finished within six months of the announcement of the initiation of the investigation. This period may be extended for no more than three months under special circumstances.<sup>111</sup>

#### 4. Procedural rights

Complainants' procedural rights are guaranteed by the *Foreign Trade Barriers Investigation Rules*. They have the right to have their complaints duly reviewed by the Ministry of Commerce.<sup>112</sup> They are ensured that an investigation be initiated if their complaints satisfy the requirement.<sup>113</sup> They have the right to be informed of the Ministry of Commerce's decision on the initiation of an investigation.<sup>114</sup>

In addition, interested parties also have certain procedural rights. They have the right to be informed the Ministry of Commerce's decision on initiating an investigation.<sup>115</sup> They are entitled to asking the Ministry of Commerce to keep confidential the materials they submit.<sup>116</sup> In practice, interested parties have the right of access to the non-confidential version of complaints and evidentiary materials at the Bureau of Fair Trade for Imports and Exports.<sup>117</sup>

#### C. Comparison

The most noticeable characteristic in both of the two procedures is their accessibility to enterprises and industry. This access demonstrates the public authorities' intention of forging

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<sup>111</sup> *Id.* at art.32.

<sup>112</sup> *Id.* at art.10.

<sup>113</sup> *Id.* at art.12.

<sup>114</sup> *Id.* at art.13.

<sup>115</sup> *Id.* at art.13.

<sup>116</sup> *Id.* at art.23,24.

<sup>117</sup> The Ministry of Commerce Announcement No. 16, 2004, *supra* note 98.

public-private partnership so as to promote international trade negotiation and dispute settlement. On the one hand, the public authorities benefit from the private sector's informational and financial resources. On the other hand, the private sector is given a track to press the public authorities to defend their interests.<sup>118</sup> Besides, the two procedures have similar stages with definite time limits, similar investigation means are employed in the two procedures, both of the two procedures seek transparency, and, the complainants and other parties concerned are granted procedural rights in both of the two procedures.

The biggest difference between the two procedures lies in the standards for complainants' burden of proof. In comparison, the complainants' burden of proof is lower under the *Foreign Trade Barriers Investigation Rules*.<sup>119</sup> There are two main reasons. First, Chinese enterprises tend to be more wary of litigation. Too strict requirements for the complaint would further restrain their enthusiasm to use the procedure. Second, Chinese enterprises' possession of resources and expertise is currently limited so that it is impractical to impose on them heavy responsibilities on the preparation of complaints and evidence collection. Nevertheless, the private sector is still motivated to participate actively in order to persuade the authority to defend its interest. For example, the Ministry of Commerce may decide not to initiate an investigation if the materials submitted by the complainant are incomplete and the complainant does not provide supplementary materials within the time limit.<sup>120</sup> The Ministry of Commerce

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<sup>118</sup> SHAFFER, *supra* note 3, 15-16.

<sup>119</sup> Foreign Trade Barriers Investigation Rules, *supra* note 5, at art.7,8.

<sup>120</sup> *Id.* at art.16.

may also terminate the investigation if the complainant does not provide appropriate cooperation during the investigation.<sup>121</sup>

Several defects are distinct in the *Foreign Trade Barriers Investigation Rules*. Although there are several provisions concerning the rights of interested parties in the Rules, there is no definition for the term “interested parties”. Furthermore, interested parties are not guaranteed a chance to provide information since the Ministry of Commerce is not obligated to hold a hearing during the investigation.<sup>122</sup>

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<sup>121</sup> *Id.* at art.30.

<sup>122</sup> *Id.* at art.21.

## Chapter IV. Substantive Requirements

### A. *Trade Barriers Regulation*<sup>123</sup> in the European Union

The substantive requirements in the TBR include: qualifications for the complainants, obstacles to trade, and injury or adverse trade effects resulting from the obstacles to trade.

#### 1. The qualification for the complainants

As mentioned before, there are three kinds of complainants under the TBR. They are Community industry, Community enterprises and Member States.

“Community industry” is defined in the following four situations: (1) all Community producers or providers of products or services “identical or similar to the product or service which is the subject of an obstacle to trade”;<sup>124</sup> (2) all Community producers or providers of products or services “competing directly with” the product or service that is the subject of an obstacle to trade;<sup>125</sup> (3) all Community producers or providers who are “consumers or processors of the product or consumers or users of the service which is the subject of an obstacle to trade”;<sup>126</sup> or (4) all those producers or providers whose “combined output constitutes a major proportion of total Community production of the products or services in

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<sup>123</sup> Council Regulation 3286/94, *supra* note 4.

<sup>124</sup> *Id.* at art. 2.5.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

question.”<sup>127</sup> Nevertheless, there are two exceptions to the requirement that industry include all producers or providers. First, when producers or providers are “related to the exporters or importers or are themselves importers of the product or service alleged to be the subject of obstacles to trade,” “Community industry” may be interpreted as the rest of the producers or providers.<sup>128</sup> Second, when the effect of the obstacle to trade is concentrated in one Member State or some Member States, the producers or providers within a region of the Community may be regarded as the Community industry if their collective output constitutes the “major proportion of the output of the product or service in question” in that Member State or Member States.<sup>129</sup>

“Community enterprise” means a Community company or firm “directly concerned by the production of goods or the provision of services” which are the subject of the obstacle to trade.<sup>130</sup> A Community company or firm refers to a company or firm that is formed in accordance with the law of a Member State and has its registered office, central administration or principal place of business within the Community.<sup>131</sup>

Obviously, the quantitative requirement for the term “Community industry” is much more strict. Such difference leads to different standards of burden of proof imposed upon Community industry and Community enterprises, which will be examined below.

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at art. 2.6.

<sup>131</sup> *Id.*

## 2. Obstacles to trade

The TBR defines “obstacles to trade” as “any trade practice adopted or maintained by a third country in respect of which international trade rules establish a right of action.”<sup>132</sup> Such a right of action exists “when international trade rules either prohibit a practice outright, or give another party affected by the practice a right to seek elimination of the effect of the practice in question.”<sup>133</sup> The first situation refers to violation of international trade rules. The second situation falls squarely within the category of non-violation complaints under the WTO rules,<sup>134</sup> demonstrating the TBR’s strategic link with the WTO dispute settlement mechanism.

The TBR contains no definition for “trade practice”. In reality, legislative measures have been the most frequent target for the complaints lodged under TBR.<sup>135</sup> Administrative practices have also been subject to investigations.<sup>136</sup> Furthermore, the TBR is targeted at “any trade practice adopted or maintained by a third country.”<sup>137</sup> In other words, the TBR is directed against government practices rather than private practices.<sup>138</sup>

To date, all the investigations under the TBR have been centered on trade practices that the complainants alleged to be violations of WTO agreements.<sup>139</sup> No investigation has ever been

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<sup>132</sup> *Id.* at art. 2.1.

<sup>133</sup> *Id.*

<sup>134</sup> General Agreement on Tariff and Trade, art. 23.1(b), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] . It refers to the situation where the benefit accruing to one WTO Member State is nullified or impaired by the application of another WTO Member State of any measure, whether or not it conflicts with the provisions of the Agreement.

<sup>135</sup> Robert M. Maclean, *The European Community’s Trade Barriers Regulation Takes Shape: Is It Living Up to Expectations?* 33(6) J. OF WORLD TRADE 69, 73 (1999).

<sup>136</sup> *Id.*

<sup>137</sup> Council Regulation 3286/94, *supra* note 4, at art.2.1.

<sup>138</sup> Bronckers, *supra* note 18, at 436.

<sup>139</sup> CROWELL, *supra* note 76, at Annex F.

initiated upon allegation of injuries or adverse trade effects caused by trade practices that do not conflict with international trade rules. The types of trade practices in the past cases cover import/export restrictions, internal discrimination, intellectual property rights protection, subsidies, retaliatory measures, restrictions on transit and trade remedy measures.<sup>140</sup>

### 3. Injury

The complaint lodged on behalf of the Community industry shall contain sufficient evidence of the injury caused by the obstacles to trade.<sup>141</sup> The TBR defines “injury” as “any material injury which an obstacle to trade causes or threatens to cause, in respect of a product or service, to a Community industry on the market of the Community.”<sup>142</sup> The factors that shall be considered in the determination of injury include: (a) the Community imports or exports volume;<sup>143</sup> (b) the prices of the Community industry’s competitors;<sup>144</sup> (c) the consequent impact on the Community industry.<sup>145</sup> As regards the threat of injury, the Commission shall examine “whether it is clearly foreseeable”<sup>146</sup> that actual injury will be developed.

*U.S.—Subsidies on oilseed production*<sup>147</sup> is the only case purely based on the allegation of injury caused by obstacles to trade. The complainant alleged that the U.S. subsidies caused

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<sup>140</sup> *Id.* at 35-37.

<sup>141</sup> Council Regulation 3286/94, *supra* note 4, at art.3.2.

<sup>142</sup> *Id.* at art. 2.3.

<sup>143</sup> *Id.* at art.10.1.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at art.10.2.

<sup>147</sup> Commission Notice of Initiation of an Examination Procedure Concerning an Obstacle to Trade, within the Meaning of Council Regulation (EC) No 3286/94, Consisting of Subsidies Afforded by the United States of America to Oilseed Production, 2003 O.J. (C58) 3.

price depression, as well as increased import volumes in the European market.<sup>148</sup> However, the Commission concluded that the evidence at that time was insufficient to support a final conclusion on whether the subsidies cause or threaten to cause serious injury.<sup>149</sup> Nevertheless, the Commission is monitoring the evolution of the situation and collecting further evidence on the possible negative impact of the U.S. subsidies.<sup>150</sup> In addition, all of the three other cases in which the complainants alleged both injury and adverse trade effects lead to confirmative conclusions.<sup>151</sup>

#### 4. Adverse trade effects

The complaint lodged on behalf of the Community enterprises shall provide sufficient evidence of the adverse trade effects caused by the obstacles to trade.<sup>152</sup> In such cases, the

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<sup>148</sup> *Id.*

<sup>149</sup> EUROPEAN COMMISSION, DIRECTORATE-GENERAL FOR TRADE, GENERAL OVERVIEW OF ACTIVE WTO DISPUTE SETTLEMENT CASES INVOLVING THE EC AS COMPLAINANT OR DEFENDANT AND OF ACTIVE CASES UNDER THE TRADE BARRIERS REGULATION, 29 (2006)  
[http://trade-info.cec.eu.int/doclib/docs/2006/february/tradoc\\_118122.pdf](http://trade-info.cec.eu.int/doclib/docs/2006/february/tradoc_118122.pdf) (last visited Mar. 15, 2006).

<sup>150</sup> *Id.*

<sup>151</sup> EUROPEAN COMMISSION, REPORT TO THE TRADE BARRIERS REGULATION COMMITTEE: TBR PROCEEDINGS CONCERNING CHILEAN PRACTICES AFFECTING TRANSIT OF SWORDFISH IN CHILEAN PORTS 67 (March 23, 1999),  
[http://trade-info.cec.eu.int/doclib/docs/2004/october/tradoc\\_112193.pdf](http://trade-info.cec.eu.int/doclib/docs/2004/october/tradoc_112193.pdf) (last visited Mar. 16, 2006);  
 EUROPEAN COMMISSION, REPORT TO THE TRADE BARRIERS REGULATION COMMITTEE: TBR PROCEEDINGS CONCERNING BRAZILIAN SUBSIDIES FOR EXPORT OF REGIONAL AIRCRAFT (October 27, 1999),  
[http://Europa.eu.int/comm/trade/issues/respectrules/tbr/cases/bra\\_air.htm](http://Europa.eu.int/comm/trade/issues/respectrules/tbr/cases/bra_air.htm) (last visited Mar. 16, 2006);  
 EUROPEAN COMMISSION, REPORT TO THE TRADE BARRIERS REGULATION COMMITTEE: EXAMINATION PROCEDURE CONCERNING AN OBSTACLE TO TRADE, WITHIN THE MEANING OF COUNCIL REGULATION (EC) NO 3286/94, CONSISTING OF TRADE PRACTICES MAINTAINED BY KOREA AFFECTING TRADE IN COMMERCIAL VESSELS, 67 (May 8, 2001),  
[http://trade-info.cec.eu.int/doclib/docs/2003/april/trade\\_112207.pdf](http://trade-info.cec.eu.int/doclib/docs/2003/april/trade_112207.pdf) (last visited Mar. 16, 2006).

<sup>152</sup> Council Regulation 3286/94, *supra* note 4, at art.4.2.

Commission shall examine not only the effects to the enterprises on the third country market caused by the obstacles to trade, but also the impact of such effects on the economy of the Community, a region of the Community or a sector of economic activity therein.<sup>153</sup> The factors that shall be considered in the determination of “injury” apply here too.<sup>154</sup> The rationale behind the requirement is two-fold. On the one hand, the opening of a third country market does not necessarily benefit the whole of the EU industry.<sup>155</sup> On the other hand, the concept of injury is inadequate to cover the issues of market access, especially trade opportunities, competitive relationships and potential trade flows.<sup>156</sup> With this requirement, the Commission can filter out cases that would benefit only the complainant and concentrate on cases which have a broader impact on the whole Community.<sup>157</sup> In practice, satisfying this requirement has not proved to be particularly onerous.<sup>158</sup> First, the Commission tends to extrapolate the adverse trade effects on the complainant by considering the possible impact of the trade practices on the Community.<sup>159</sup> Second, this requirement is automatically satisfied when the complainant represents an entire Community industry, region or sector.<sup>160</sup>

The TBR identifies two situations where adverse trade effects may arise: (a) trade flows concerning a product or service are “prevented, impeded or diverted as a result of any obstacle

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<sup>153</sup> *Id.* at art.10.4.

<sup>154</sup> *Id.*

<sup>155</sup> Eeckhaute, *supra* note 50, at 202-03.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> Maclean, *supra* note 135, at 88.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

to trade”;<sup>161</sup> or (b) obstacles to trade have “materially affected the supply or inputs (e.g. parts and components or raw materials) to Community enterprises.”<sup>162</sup> According to the investigations that have already been concluded, the adverse trade effects existed in the forms of loss of export opportunities, decrease in market shares, increase of costs, loss of competitiveness, loss of profits, etc.<sup>163</sup> With regard to the threat of adverse trade effects, the Commission shall examine “whether it is clearly foreseeable”<sup>164</sup> that actual adverse trade effects will be developed.

To date, *U.S.—Restrictions on the prepared mustard*<sup>165</sup> has been the only case with a negative conclusion on the determination of adverse trade effects, which was upheld upon appeal in the European Court of First Instance.<sup>166</sup> *Canada—Geographical Indications for*

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<sup>161</sup> Council Regulation 3286/94, *supra* note 4, at art.10.4.

<sup>162</sup> *Id.*

<sup>163</sup> CROWELL, *supra* note 76, at 84; Maclean, *supra* note 135, at 83-87.

<sup>164</sup> Council Regulation 3286/94, *supra* note 4, at art.10.4.

<sup>165</sup> EUROPEAN COMMISSION, REPORT TO THE TRADE BARRIERS REGULATION COMMITTEE: TBR PROCEEDINGS CONCERNING TRADE PRACTICES MAINTAINED BY THE UNITED STATES OF AMERICA IN RELATION TO THE IMPORTS OF PREPARED MUSTARD 30 (Mar.6, 2002), [http://trade-info.cec.eu.int/doclib/docs/2004/october/tradoc\\_112204](http://trade-info.cec.eu.int/doclib/docs/2004/october/tradoc_112204) (last visited Mar. 16, 2006).

<sup>166</sup> Case T-317/02, FICF v. Comm’n of the European Communities, para. 64-74, <http://curia.eu.int/en/content/juris/index.htm> (last visited Mar. 15, 2006). Article 230 of the EC Treaty confers the Court of Justice the right to review the act of the Commission. This Article also confers any natural or legal person the right to institute proceedings against a decision which is addressed or of direct and individual concern to himself/herself. According to Article 1.1 of the Council Decision 93/350 of June 8, 1993 amending Council Decision 88/591/ECSC, EEC, E.U.ratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144/21), the Court of First Instance shall exercise at first instance the jurisdiction conferred on the Court of Justice by the EC Treaty.

wines<sup>167</sup> has been the only one case in which the Commission confirmed the existence of a threat of adverse trade effects within the meaning of Article 2.4 of TBR.<sup>168</sup>

## **B. Foreign Trade Barriers Investigation Rules<sup>169</sup> in China**

There are two substantive requirements in the *Foreign Trade Barriers Investigation Rules*.<sup>170</sup>

### **1. The qualification for the complainants**

There are two kinds of complainants under the *Foreign Trade Barriers Investigation Rules*, domestic enterprises and industry. They are defined as the enterprises or industry directly concerned with the products or services in question.<sup>171</sup>

### **2. Trade barriers**

The definition of “trade barriers” contains two elements.<sup>172</sup> First, trade barriers refer to the measures or practices adopted or supported by the governments of foreign countries (regions).<sup>173</sup> Second, these measures or practices either (1) violate the economic treaty or

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<sup>167</sup> EUROPEAN COMMISSION, REPORT TO THE TRADE BARRIERS REGULATION COMMITTEE—TBR EXAMINATION PROCEDURE CONCERNING AN OBSTACLE TO TRADE, WITHIN THE MEANING OF COUNCIL REGULATION (EC) NO. 3286/94, CONSISTING OF TRADE PRACTICES MAINTAINED BY CANADA IN RELATION TO CERTAIN GEOGRAPHICAL INDICATIONS FOR WINES, 22-23 (Jan. 24, 2003), [http://trade-info.cec.eu.int/doclib/docs/2004/october/tradoc\\_112182.pdf](http://trade-info.cec.eu.int/doclib/docs/2004/october/tradoc_112182.pdf) (last visited Mar. 16, 2006).

<sup>168</sup> *Id.*; Council Regulation 3286/94, *supra* note 4, at art.2.4.

<sup>169</sup> Foreign Trade Barriers Investigation Rules, *supra* note 5.

<sup>170</sup> *Id.* at art.1.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at art.3.

<sup>173</sup> *Id.*

agreement which the country (region) concluded or entered together with China, or fail to fulfill the obligations under such a trade treaty or agreement;<sup>174</sup> or (2) cause or may cause one of the following negative impacts: the products or services of China are prevented or hindered from entering the market of the country (region) concerned or a third country (region); the competitiveness of the products or services of China in the market of the country (region) concerned or a third country (region) is injured; or the products or services of the country (region) concerned or a third country (region) are prevented or hindered from entering China.<sup>175</sup>

If the measures or practices concerned fall into the first category, the complaint does not need to prove the existence of any injury or negative impact caused thereby.<sup>176</sup> It can be called “violation test”. Nevertheless, a measure or practice that does not violate any international agreement may still constitute trade barrier if it causes or may cause any negative impact mentioned above.<sup>177</sup> It can be called “negative impact test”. The second category includes, but is not limited to, the non-violation situation in the WTO.

### C. Comparison

In both of the pieces of law, the qualification for the complainants focuses on their relationship with the product or service in question. In comparison, the definition of domestic enterprises and industry in the *Foreign Trade Barriers Investigation Rules* is too simplified.<sup>178</sup>

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at art.3.

There are no standards for the determination of domestic enterprise. There is no quantitative requirement for obtaining standing as an industry. All these ambiguities will give rise to disputes regarding the standing of complainants in the implementation of the Rules.

Two common elements exist between the definitions of “obstacles to trade” in the TBR and “trade barrier” in the *Foreign Trade Barriers Investigation Rules*. First, they are both limited to government trade practices so that private practices are excluded.<sup>179</sup> Second, they both cover violation and non-violation situations. This complies with the provisions on the types of complaints in WTO agreements.<sup>180</sup>

Nevertheless, there also exist differences between the two definitions. First, their overall coverage is different. The definition of “obstacles to trade” in the TBR has a direct and exclusive link with international trade rules, especially those contained in WTO agreements.<sup>181</sup> According to this definition, only those trade practices “in respect of which international trade rules establish a right of action” may be deemed as obstacles to trade.<sup>182</sup> Therefore, it excludes the situation where the EU determines the existence of obstacles to trade according to its own standards. The definition of “trade barrier” in the *Foreign Trade Barriers Investigation Rules* seems broader than “obstacles to trade”. It contains not only trade practices violating economic treaties or agreements, but also trade practices satisfying the “negative impact test.”<sup>183</sup>

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<sup>179</sup> Council Regulation 3286/94, *supra* note 4, art.2.1.

<sup>180</sup> See GATT, *supra* note 134, at art. 23.1.

<sup>181</sup> Council Regulation 3286/94, *supra* note 4, art.2.1.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

Therefore, a trade practice that has not yet been subject to any international trade rules may also constitute a trade barrier if it satisfies the “negative impact test”.

Second, the coverage of the government practices in the two definitions may be different. The TBR limits “obstacles to trade” to the measures or practices adopted or maintained by a third country,<sup>184</sup> whereas the *Foreign Trade Barriers Investigation Rules* limits “trade barrier” to the measures or practices adopted or supported by the governments of foreign countries (regions).<sup>185</sup> It is evident that two different words are used in the two definitions, namely, “maintained” and “supported”. No further explanation was given for the two words in the legal texts. The ambiguity may give rise to disagreement on the coverage of government practices. According to the *New Oxford American Dictionary*, the relevant meaning of “maintain” is to cause or enable a state of affairs to continue.<sup>186</sup> The relevant meaning of “support” is to give assistance to someone or something, especially financially.<sup>187</sup> Accordingly, no matter how the authorities will interpret the two words, the bottom line is that the government must at least play a certain positive role in the practices. Therefore, private practices merely tolerated by a government should certainly not be deemed as maintained or supported by a government.<sup>188</sup> To date, no case under the TBR or *Foreign Trade Barriers Investigation Rules* has ever touched this issue.<sup>189</sup> Nevertheless, there was a relevant case under the TBR’s predecessor NCPI.<sup>190</sup>

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<sup>184</sup> *Id.* at art.2.1.

<sup>185</sup> *Id.*

<sup>186</sup> THE NEW OXFORD AMERICAN DICTIONARY 1022 (2<sup>nd</sup> ed. 2005).

<sup>187</sup> *Id.* at 1699.

<sup>188</sup> See Bronckers, *supra* note 18, at 436.

<sup>189</sup> Nevertheless, there is a WTO case relevant here, namely, Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products (WT/DS103, WT/DS113). In this case, Canadian special milk classes scheme was challenged by the U.S. and New Zealand. One of the complainants’ claims is that

This case involved unauthorized reproduction of sound recordings by individuals in Indonesia.<sup>191</sup> These piracy activities were alleged to be tolerated, and in fact taxed, by the Indonesian government.<sup>192</sup> Under the NCPI, illicit commercial practices are defined as “any international trade practices attributable to third countries which are incompatible with international law or with the generally accepted rules.”<sup>193</sup> The Commission therefore concluded that there existed *prima facie* evidence for the existence of illicit commercial practices.<sup>194</sup> This case was probably the most controversial under the NCPI.<sup>195</sup> Had it been brought under the TBR, it would have been difficult for the complaint to be admitted.<sup>196</sup>

Apart from the existence of obstacles to trade, there is another element for complaints under the TBR to prove: That is “injury” for the Community industry or “adverse trade effects”

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the scheme violates Article 9.1 (c) of the Agreement on Agriculture. Article 9.1 of the Agreement on Agriculture lists 6 kinds of export subsidies which shall be subject to reduction commitments. Subparagraph (c) deals with “payments on the export of an agricultural product that are financed by virtue of governmental action……”. The panel found that, “although the payment under this scheme is not financed directly with governmental funds, is, nevertheless, financed by virtue of governmental action in the sense of Article 9.1(c).” This finding was upheld by the Appellate Body. See Panel Report, *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R (May 17, 1999); Appellate Body Report, *Canada — Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R (Oct. 13, 1999).

<sup>190</sup> Council Regulation 2641/84, *supra* note 10.

<sup>191</sup> 88/287/EEC, Commission Decision of 11 May 1988 terminating the examination procedure concerning the unauthorized reproduction of sound recordings in Indonesia consequent on the Republic of Indonesia's undertaking to give sound recordings by nationals of Community Member States the same protection as sound recordings by Indonesian nationals, 1988 O.J. (L123) 51 (EC).

<sup>192</sup> See Bronckers, *supra* note 18, at 436.

<sup>193</sup> Council Regulation 2641/84, *supra* note 10, at art.2.1.

<sup>194</sup> 87/553/EEC, Commission Decision of 23 November 1987 suspending the illicit commercial practices procedure concerning the unauthorized reproduction of sound recordings in Indonesia, 1987 O.J. (L335) 22 (EC).

<sup>195</sup> See Bronckers, *supra* note 18, at 463.

<sup>196</sup> *Id.*

for the Community enterprises.<sup>197</sup> It is reasonable to set different burden of proof for the two kinds of complainants since their qualifications are different. Nevertheless, there have been few cases initiated on behalf of Community industry because both the standing requirement and the “injury” test are difficult to satisfy. There has been a proposal recommending that EU enterprise is sufficiently flexible and wide in scope to represent the whole private sector as the complainant under the TBR.<sup>198</sup> Under the *Foreign Trade Barriers Investigation Rules*, domestic enterprises and industry bear the same burden of proof. There also exists a problem. Since it is easier to obtain standing as an enterprise, it would be hardly possible that a complainant would take the trouble to obtain standing as an industry. Therefore, it would make useless the provisions on industry complainants.

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<sup>197</sup> Council Regulation 3286/94, *supra* note 4, art.3, 4.

<sup>198</sup> CROWELL, *supra* note 76, at 123.

## Chapter V. Post-Examination Procedure and Follow-Up Actions

### A. *Trade Barriers Regulation*<sup>199</sup> in the European Union

The TBR investigations may lead to three options, namely, suspension of the procedure, adoption of commercial policy measures or termination of the procedure.<sup>200</sup>

#### 1. Suspension of the procedure

Suspension of the TBR procedure may be provoked in two situations: (a) the measures taken by the third country or countries are satisfactory, and therefore no action by the Community is needed,<sup>201</sup> or (b) it appears that the most appropriate means to resolve the issue is to conclude an agreement with the third country or countries concerned.<sup>202</sup> In the former situation, the application of the measures shall be monitored by the Commission and action may be taken if “the measures have been rescinded, suspended or improperly implemented.”<sup>203</sup>

There is no time limit for the negotiation of an agreement or suspension of the procedure.

As the overriding objective of the TBR is to remove obstacles to trade as soon as possible, a negotiated solution is preferred by the Commission for its flexibility and rapidity.<sup>204</sup> To date,

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<sup>199</sup> Council Regulation 3286/94, *supra* note 4.

<sup>200</sup> *Id.* at art. 11, 12.1.

<sup>201</sup> *Id.* at art.11.2.

<sup>202</sup> *Id.* at art. 11.3.

<sup>203</sup> *Id.*

<sup>204</sup> Eeckhaute, *supra* note 50, at 209.

bilateral agreements or understandings have been reached in twelve cases.<sup>205</sup> In a number of cases, settlements were reached only after the EU requested consultations within the WTO.<sup>206</sup>

## 2. Adoption of commercial policy measures

Commercial policy measures may be taken when the Commission considers them necessary in the interests of the Community in order to remove the obstacles to trade.<sup>207</sup> If the Community's international obligations require "the prior discharge of an international procedure for consultation or for the settlement of disputes,"<sup>208</sup> such a procedure shall be followed prior to the adoption of commercial policy measures.<sup>209</sup> No time period is provided in the TBR for the activation of formal dispute settlement procedures under the WTO or other applicable trade agreements. Furthermore, commercial policy measures should be compatible with the EU's existing international obligations and procedure.<sup>210</sup> The TBR lists three notable forms of measures: (a) suspension or withdrawal of any trade concession;<sup>211</sup> (b) an increase of existing customs duties or introduction of any other charge on imports;<sup>212</sup> (c) introduction of quantitative restrictions or any other measures on imports or exports.<sup>213</sup>

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<sup>205</sup> CROWELL, *supra* note 76, at 52; *See* also the annex.

<sup>206</sup> *Id.*

<sup>207</sup> Council Regulation 3286/94, *supra* note 4, at art. 12.1.

<sup>208</sup> *Id.* at art 12.2.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at art. 12.3.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

In the past TBR cases, the WTO has been the exclusive forum for dispute settlement. As mentioned before, the Commission has requested consultations within the WTO on a number of occasions. Moreover, WTO panel proceeding has been triggered in five cases.<sup>214</sup>

### **3. Termination of the procedure**

When the Commission found as a result of the examination procedure that the interests of the Community do not require any action to be taken, the procedure shall be terminated with no further action.<sup>215</sup> *U.S.—Restrictions on the prepared mustard*<sup>216</sup> has been the only case terminated due to insufficiency of evidence and lack of EU interest. Moreover, several other cases were terminated after a mutually agreed solution was reached and no more actions were needed.<sup>217</sup>

## **B. Foreign Trade Barriers Investigation Rules<sup>218</sup> in China**

### **1. Suspension of the investigation**

The Ministry of Commerce may suspend the investigation in the following situations: (1) the government of the country (region) concerned promises to cancel or readjust the measures or practices within the proper time limit;<sup>219</sup> (2) the government of the country (region) concerned promises to provide China with proper trade compensation within the proper time

<sup>214</sup> CROWELL, *supra* note 76, at 53; *See also* the annex.

<sup>215</sup> Council Regulation 3286/94, *supra* note 4, at art.11.1.

<sup>216</sup> EUROPEAN COMMISSION, *supra* note 165.

<sup>217</sup> *See* the annex.

<sup>218</sup> Foreign Trade Barriers Investigation Rules, *supra* note 5.

<sup>219</sup> Foreign Trade Barriers Investigation Rules, *supra* note 5, at art.26.

limit;<sup>220</sup> (3) the government of the country (region) concerned promises to fulfill the obligations of economic trade treaty or agreement;<sup>221</sup> or (4) other situations where the Ministry of Commerce thinks the investigation may be suspended.<sup>222</sup> Nevertheless, the Ministry of Commerce may resume the investigation once the foregoing situations disappear.<sup>223</sup>

## 2. Termination of the investigation

The investigation may be terminated in the following situations: (1) the complainant requests to terminate the investigation unless to do so conflicts with the public interest;<sup>224</sup> (2) the complainant does not provide proper cooperation during the investigation;<sup>225</sup> or (3) other situations where the Ministry of Commerce thinks the investigation may be terminated.<sup>226</sup> Furthermore, the Ministry of Commerce shall terminate the investigation in the following situations: (1) the government of the country (region) concerned has canceled or readjusted the measures or practices under investigation;<sup>227</sup> (2) the government of the country (region) concerned has provided China with proper trade compensation;<sup>228</sup> or (3) the government of the country (region) concerned has fulfilled the obligations under the economic trade treaty or agreement concerned.<sup>229</sup>

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<sup>220</sup> *Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.* at art.27.

<sup>224</sup> *Id.* at art.28.

<sup>225</sup> *Id.* at art.30.

<sup>226</sup> *Id.*

<sup>227</sup> Foreign Trade Barriers Investigation Rules, *supra* note 5, at art.29.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

### **3. Adoption of measures**

Upon the conclusion of the investigation, the Ministry of Commerce shall determine whether the measures or practices constitute trade barriers and publish the decision thereof.<sup>230</sup>

If the measures or practices concerned are determined to constitute trade barriers, the Ministry of Commerce shall take the following activities with consideration of the situation involved: (1) holding bilateral consultations with the country (region) concerned; (2) initiating a multilateral dispute settlement proceeding; or (3) other measures as appropriate.<sup>231</sup>

### **C. Comparison**

As pragmatic policy instruments, both of the procedures prefer mutually acceptable solutions.<sup>232</sup> In order to achieve this

Initiating multilateral dispute settlement procedures is listed as one follow-up action under both of the procedures. However, their approaches are different. The TBR clearly provides that an international dispute settlement procedure shall be followed before the adoption of any commercial policy measure if the EU's international obligation requires so.<sup>235</sup> It further stipulates that any commercial policy measures shall be compatible with existing international obligations and procedures.<sup>236</sup> Such provisions ensure that any action taken under the TBR will be consistent with international law. To the contrary, the statutory language in the *Foreign Trade Barriers Investigation Rules* grants the authorities discretion in the adoption of follow up measures.<sup>237</sup> It does not impose an obligation to follow an international procedure even when required by China's obligation under an international agreement. It therefore puts China in a position of potential breach of its international obligations. According to the *Understanding on Rules and Procedures Governing the Settlement of Disputes*, a WTO Member shall "have recourse to and abide by the rules and procedures" provided by it to seek the solution of disputes arising from another Member's trade practices falling within the scope of WTO agreements.<sup>238</sup> In other words, unilateral action is excluded in such situations.<sup>239</sup> As a

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<sup>235</sup> Council Regulation 3286/94, *supra* note 4, at art. 12.2.

<sup>236</sup> *Id.* at art. 12.3.

<sup>237</sup> Foreign Trade Barriers Investigation Rules, *supra* note 5, at art. 33.

<sup>238</sup> DSU, *supra* note 233, at art. 23.

<sup>239</sup> In this respect, a WTO case is worth mentioning. On February 2, 1999, the European Communities initiated a dispute challenging the consistency of sections 301-310 of the U.S. Foreign Trade Act of 1974 with U.S. obligations under WTO agreements, in which other 16 WTO member states participated as third parties. According to the Panel, the statutory language of Sections 304, 305 and 306 allows the USTR to exercise its discretion contrary to U.S. obligations under Article 23 of the DSU, therefore constituting a *prima facie* violation of Article 23. Nevertheless, the Panel noted that the U.S. Administration had pledged in the SAA, and before the Panel, that it would not exercise its discretion contrary to its obligations under Article 23. The Panel held that these undertakings effectively and legally curtailed the offending discretionary element, and therefore removed the *prima facie* WTO inconsistencies created by the statutory

Member State of WTO, China is obligated to have recourse to WTO dispute settlement proceeding with regards to any dispute falling within the scope of WTO agreements. The *Foreign Trade Barriers Investigation Rules* should be revised so as to be consistent with such an obligation.

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language of Sections 301-310. Thus, the Panel found that Sections 304(a)(2)(A), 305(a) and 306(b) of the U.S. Trade Act of 1974 were not inconsistent with Article 23.2(a) or (c) of the DSU or with any of the GATT 1994 provisions cited. However, the panel stated that should those undertakings be repudiated or in any other way removed, its findings of conformity would no longer be warranted. The DSB adopted the panel report at its meeting on January 27, 2000. See Panel Report, *United States—Sections 301-310 of the Trade Act of 1974*, WT/DS152/R (Dec. 22, 1999).

## Chapter VI. Judicial Review

### A. *Trade Barriers Regulation*<sup>240</sup> in the European Union

Throughout the TBR procedure, the Commission has to make decisions on a number of issues.<sup>241</sup> All of these decisions may not be necessarily agreeable to the complainants and other persons concerned. Although the EC Treaty includes provisions of judicial review against the Commission's decisions,<sup>242</sup> the TBR contains no parallel provisions. The question of whether the Commission's decisions could be brought for judicial review, was answered in the case *FICF v. Commission of the European Communities*.<sup>243</sup> In this case, the Court of First Instance found that, the procedural safeguards in the TBR show that "a complainant under Article 4 has the right to submit for review by the Court any decision of the Commission terminating an examination procedure initiated as a result of his complaint."<sup>244</sup> The allegations of the applicants in this case covered violations of Article 2.1, 2.4, 8.5, 8.8, 10.5, 11.1<sup>245</sup> of the TBR.<sup>246</sup> However, the Court of First Instance rejected all the allegations.<sup>247</sup>

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<sup>240</sup> Council Regulation 3286/94, *supra* note 4.

<sup>241</sup> These issues include the admissibility of the complaint, initiation of dispute settlement procedure, termination or suspension of procedure, and adoption of commercial policy measures.

<sup>242</sup> EC Treaty, *supra* note 83, at article 230.

<sup>243</sup> *FICF v. Commission of the European Communities*, *supra* note 166, at ¶ 41.

<sup>244</sup> *Id.*

<sup>245</sup> Council Regulation 3286/94, *supra* note 4, at art. 2.1, 2.4, 8.5, 8.8, 10.5, 11.1.

<sup>246</sup> *Id.* at ¶ 43.

<sup>247</sup> *Id.* at ¶ 202.

## **B. Foreign Trade Barriers Investigation Rules<sup>248</sup> in China**

There are two kinds of remedies available for the complainant and other persons concerned who disagree with the decisions made pursuant to the *Foreign Trade Barriers Investigation Rules*. One is administrative review,<sup>249</sup> and the other is judicial review.<sup>250</sup> The complainant or other persons concerned have the option to choose whichever they like. If they are not satisfied with the decision of administrative review, they can still submit the issue for judicial review.<sup>251</sup> The judgment in judicial review is final.<sup>252</sup> The request of administrative review shall be submitted to the Department of Treaty and Law within the Ministry of Commerce.<sup>253</sup> The request of judicial review shall be submitted to the Intermediate People's Court for the first instance.<sup>254</sup> So far, no administrative review or judicial review has ever been requested.

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<sup>248</sup> Foreign Trade Barriers Investigation Rules, *supra* note 5.

<sup>249</sup> Zhong Hua Ren Min Gong He Guo Xing Zheng Fu Yi Fa [Administrative Review Law] (promulgated by the Nat'l People's Cong., Apr. 29, 1999, effective Oct. 1, 1999), art. 6, 1999 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 3 (P.R.C.)

<sup>250</sup> Zhong Hua Ren Min Gong He Guo Xing Zheng Su Song Fa [Administrative Procedure Law] (promulgated by the Nat'l People's Cong., Apr. 4, 1989, effective Oct. 1, 1990), art. 2, LAWINFOCHINA (last visited Mar. 16, 2006) (P.R.C.).

<sup>251</sup> *Id.* at art. 11, 38; Administrative Review Law, *supra* note 249, at art. 5.

<sup>252</sup> Administrative Procedure Law, *supra* note 250, at art. 60.

<sup>253</sup> Shang Wu Bu Xing Zheng Fu Yi Shi Shi Ban Fa [Implementation Measures for Administrative reconsideration of the Ministry of Commerce] (promulgated by the Ministry of Commerce, May 20, 2004, effective July 1, 2004), art. 2, LAWINFOCHINA (last visited Mar. 16, 2006) (P.R.C.).

<sup>254</sup> Administrative Procedure Law, *supra* note 250, at art. 14.

## Chapter VII. Implementation of the Law

### A. Trade Barriers Regulation<sup>255</sup> in the European Union

#### 1. An overview

Considering the TBR as an important instrument to implement the new Market Access Strategy,<sup>256</sup> the Commission is actively inviting the European enterprises to lodge complaints on unfair foreign trade practices pursuant to it. In order to help identify trade barriers that hamper European enterprises in third countries, the Commission has set up a comprehensive market access database.<sup>257</sup> Through the database, the Commission also intends to maintain a continuous three-way exchange of information between the EU institutions, Member States and European business.<sup>258</sup> In order to improve transparency, the Commission not only publishes the notices of initiation of TBR examination procedures in the *Official Journal of the European Communities*, but also puts them on the website of the Directorate-General for Trade.<sup>259</sup> Moreover, the Commission released a model complaint on the website of Directorate-General

<sup>255</sup> Council Regulation 3286/94, *supra* note 4.

<sup>256</sup> *Supra* note 7.

<sup>257</sup> EU Market Access, <http://mkacddb.eu.int> (last visited Mar. 16, 2006). The Database provides a wide range of market access information, including economic and regulatory information, applied tariff levels and analyses of trade issues, and the material is updated regularly throughout the year.

<sup>258</sup> Michael Sanchez Rydelshi, G.A.V.R.Zonnekeyn, *The EC Trade Barriers Regulation: The EC's move towards a more aggressive market access strategy*, 31(5) J. OF WORLD TRADE 147, 160 (1997).

<sup>259</sup> EUROPA I-Centre, [http://trade-info.cec.eu.int/doclib/cfm/doclib\\_search.cfm?action=search](http://trade-info.cec.eu.int/doclib/cfm/doclib_search.cfm?action=search) (last visited Mar. 16, 2006). The notices of initiation and investigation reports after 1997 could be searched through this engine.

for Trade so as to make the preparation of complaints much easier.<sup>260</sup> These efforts have not been without avail. The TBR has so far been a success as evidenced by the Commission.<sup>261</sup> As of the end of 2005, the Commission had launched 24 investigations in response to petitions lodged by the private sector.<sup>262</sup> Generally, a satisfactory outcome could be secured either through bilateral consultation or WTO dispute settlement proceeding.<sup>263</sup> The following case will illustrate how the TBR is an efficient private sector tool to press the Commission to remove foreign trade barriers.

## **2. A successful case under the TBR: U.S.—Anti-dumping Act of 1916<sup>264</sup>**

The case concerning the 1916 U.S. Antidumping Act<sup>265</sup> (hereinafter referred to as 1916 Act) was the first TBR case which led to a WTO panel request.<sup>266</sup> But for the complaint filed by the European Confederation of Iron and Steel Industries (hereinafter referred to as EUROFER)<sup>267</sup>, it would have been hardly possible for the Commission to challenge the 1916 Act, although it is inconsistent with the WTO's antidumping rules.<sup>268</sup>

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<sup>260</sup> Model TBR Complaint, [http://trade-info.cec.eu.int/doclib/docs/2006/february/trade\\_127354.pdf](http://trade-info.cec.eu.int/doclib/docs/2006/february/trade_127354.pdf) (last visited Mar. 16, 2006).

<sup>261</sup> Eeckhaute, *supra* note 50, at 209.

<sup>262</sup> For detailed information regarding the cases, please refer to the annex.

<sup>263</sup> *Id.*

<sup>264</sup> The Revenue Act of 1916, 15 U.S.C. § 72 (repealed 2006).

<sup>265</sup> *Id.*

<sup>266</sup> Eeckhaute, *supra* note 50, at 212.

<sup>267</sup> Founded in 1976, European Confederation of Iron and Steel Industries is composed of steel companies and national steel associations throughout the European Union. Its members represent almost 100% of steel production in the EU, <http://www.eurofer.org> (last visited Mar. 16, 2006).

<sup>268</sup> *Id.*

On January 10, 1997, EUROFER, on behalf of its members, lodged a complaint pursuant to Article 4 of TBR.<sup>269</sup> The complaint alleged that the 1916 Act is inconsistent with several WTO provisions, namely Article III, VI of GATT,<sup>270</sup> Articles 1, 18.4, 9.3, 10, 5, 2, 3, 11.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994<sup>271</sup> (hereinafter referred to as Antidumping Agreement) and Article XVI:4<sup>272</sup> of the WTO Agreement.<sup>273</sup> According to the complaint, there were two main adverse trade effects of the U.S. practice. Firstly, third-country steel producers may divert their exports to the EU or other third countries where the Community industry has export interests.<sup>274</sup> Second, U.S. trading companies and user industries may shift to purchase domestic U.S. products rather than imported products alleged to be dumping.<sup>275</sup>

After consultation with the TBR Committee, the Commission decided that the complaint contained “sufficient *prima facie* evidence to justify the opening of an investigation into the U.S. practice complained of.”<sup>276</sup> In accordance with the Article 8.1(a) of the TBR,<sup>277</sup> the Commission published a Notice of Initiation of an examination procedure regarding this matter

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<sup>269</sup> Notice of Initiation of an Examination Procedure Concerning an Obstacle to Trade within the Meaning of Council Regulation No 3286/94 - Failure of the United States of America to Repeal the Antidumping Act of 1916, 1997 O.J. (C058) 14.

<sup>270</sup> GATT, *supra* note 134, at art. III, IV.

<sup>271</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 1, 18.4, 9.3, 10, 5, 2, 3, 11.1, Apr. 15, 1994, 33 I.L.M. 1125 (1994) [hereinafter Anti-Dumping Agreement] .

<sup>272</sup> Agreement Establishing the World Trade Organization, art. XVI:4, Apr. 15, 1994, 33 I.L.M. 1125 (1994).

<sup>273</sup> Notice of Initiation of an Examination Procedure Concerning an Obstacle to Trade within the Meaning of Council Regulation No 3286/94 - Failure of the United States of America to Repeal the Antidumping Act of 1916, *supra* note 269.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.*

<sup>276</sup> *Id.*

<sup>277</sup> Council Regulation 3286/94, *supra* note 4, at art. 8.1(a).

on February 25, 1997.<sup>278</sup> The notice set the time limit for public comment and request for a hearing as “not later than 30 days following the publication of the notice.”<sup>279</sup> During the investigation, the Commission had preliminary informal contacts with the United States Trade Representative on April 8, 1997.<sup>280</sup> The Commission also forwarded a questionnaire to the U.S. government,<sup>281</sup> which concerned various aspects of the 1916 Act, including its relationship with the WTO Agreements and the U.S. Uruguay Round Agreements Act.<sup>282</sup> After receiving the U.S. reply, the Commission sent further written inquiry in order to clarify the matters not sufficiently explained in the U.S. reply. However, the Commission received no response from the U.S. authorities.<sup>283</sup> Consequently, another set of written questions was sent to the U.S. authorities on July 25, 1997, which was only replied to on September 8, 1997.<sup>284</sup>

Having completed the investigation in accordance with Article 8 of the TBR,<sup>285</sup> the Commission published a report to declare its conclusion.<sup>286</sup> In this report, the Commission confirmed most of the complaint’s allegations of WTO violations, and the existence of an obstacle within the meaning of the TBR.<sup>287</sup> The Commission also affirmed that the complainant

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<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> COMMISSION REPORT TO THE COMMITTEE ESTABLISHED UNDER ARTICLE 7 OF COUNCIL REGULATION (EC) No 3286/94 (THE “TRADE BARRIERS REGULATION”) – TRADE BARRIERS REGULATION EXAMINATION PROCEDURE CONCERNING THE UNITED STATES ANTIDUMPING ACT OF 1916 (1997), [http://trade-info.cec.eu.int/doclib/docs/2004/october/tradoc\\_112212.pdf](http://trade-info.cec.eu.int/doclib/docs/2004/october/tradoc_112212.pdf) (last visited Mar. 16, 2006) [hereinafter 1916 Act Report] .

<sup>281</sup> *Id.*

<sup>282</sup> 19 USC §§ 3501-3624 (2000).

<sup>283</sup> 1916 Act Report, *Supra* note 280.

<sup>284</sup> *Id.*

<sup>285</sup> Council Regulation 3286/94, *supra* note 4, at art. 8.

<sup>286</sup> 1916 Act Report, *Supra* note 280.

<sup>287</sup> *Id.* The Commission’s conclusions on this case are as following: (1)1916 Act is inconsistent with Article

suffered “adverse trade effects as a result of the U.S. practice, and further adverse effects on the complainant’s activity and the overall Community economy are threatened.”<sup>288</sup> Based on the above findings, the Commission decided that the Community had a right of action under the relevant WTO rules within the meaning of Article 2.1 of the TBR.<sup>289</sup> Accordingly, the Commission informed the Member States of its intent to pursue the matter with the U.S. authorities, if necessary, within the WTO framework.<sup>290</sup>

On June 4, 1998, the European Communities<sup>291</sup> (hereinafter EC) requested consultations with the U.S. regarding this issue in accordance with Article 4 of the DSU,<sup>292</sup> Article XXIII of the GATT 1994<sup>293</sup> and Article 17.3 of the Antidumping Agreement.<sup>294</sup> On July 29, 1998, the EC and U.S. held a consultation on this matter in Geneva, which did not lead to a satisfactory resolution.<sup>295</sup> The EC therefore requested the establishment of a panel on November 12, 1998 in accordance with Article 6.2 of DSU and Article XXIII of the GATT 1994.<sup>296</sup> A Panel was

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VI of GATT 1994, Article 2, 3, 5.4, 9 of the WTO Anti-Dumping Agreement, as well as Article XVI:4 of the WTO Agreement, which constitute international trade rules conferring to the Community a right of action under Article 2(1) of the TBR. (2) 1916 Act is also inconsistent with the Article III:4 of GATT 1994, in that it is discriminatory against the internal sale of foreign products after importation. Therefore, Article III:4 of GATT 1994 appeared to be another international trade rule possibly conferring to the Community a right of action under Article 2(1) of the TBR. (3) In the domestic law system of the U.S., 1916 Act prevails over the Uruguay Round Agreements Act and WTO provisions in case of conflict.

<sup>288</sup> *Id.*

<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> For legal reasons, the European Union is known officially as the European Communities in the WTO business.

<sup>292</sup> DSU, *supra* note 233, at art. 4.

<sup>293</sup> GATT, *supra* note 134, at art. XXIII.

<sup>294</sup> Request for Consultations by the European Communities, *United States—Anti-Dumping Act of 1916*, WT/DS136/1 (June 4, 1998).

<sup>295</sup> Request for the Establishment of a Panel by the European Communities, *United States—Anti-Dumping Act of 1916*, WT/DS136/2 (Nov. 12, 1998).

<sup>296</sup> *Id.*

composed on April 1, 1999. In its report<sup>297</sup> dated March 31, 2000, the panel found that 1916 Act violated the Article VI:1, VI:2 of the GATT 1994,<sup>298</sup> Articles 1, 4 and 5.5 of the Anti-Dumping Agreement,<sup>299</sup> and Article XVI:4 of the WTO Agreement.<sup>300</sup> On May 29, 2000, the U.S. appealed to the Appellate Body certain issues of law covered in the panel report.<sup>301</sup> Nevertheless, the Appellate Body report upheld all of the findings and conclusions of the panel that were appealed.<sup>302</sup>

Having failed to negotiate a satisfactory agreement with the U.S. in the reasonable period of time for the implementation, the EC requested arbitration on this issue pursuant to Article 21.3 of DSU.<sup>303</sup> The award determined that the reasonable period of time would expire on July 26, 2001,<sup>304</sup> which was extended to December 20, 2001 upon the agreement of EC.<sup>305</sup> Still unsatisfied with the implementation by the U.S., the EC adopted a regulation<sup>306</sup> in 2003, which prohibits enforcement of any U.S. court decision under the 1916 Act and allows any EC company sued under the Act to counter-sue in the EC for damages. In 2004, the EC further

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<sup>297</sup> Panel Report, *United States—Anti-Dumping Act of 1916*, ¶7.1, WT/DS136/R (Mar. 31, 2000).

<sup>298</sup> GATT, *supra* note 134, at art. VI.

<sup>299</sup> Anti-Dumping Agreement, *supra* note 271, at art. 1, 4, 5.5.

<sup>300</sup> Agreement Establishing the World Trade Organization, *supra* note 272, at art. XVI:4.

<sup>301</sup> Notification of an Appeal by the United States, *United States—Anti-Dumping Act of 1916*, WT/DS136/5 (May 29, 2000).

<sup>302</sup> Appellate Body Report, *United States—Anti-Dumping Act of 1916*, ¶155, WT/DS136/AB/R (Aug. 28, 2000).

<sup>303</sup> Request for Arbitration under Article 21.3(c) of the DSU by the European Communities, *United States—Anti-Dumping Act of 1916*, WT/DS136/9 (Nov. 21, 2000).

<sup>304</sup> Arbitration Award under Article 21.3(c) of the DSU, *United States—Anti-Dumping Act of 1916*, ¶45, WT/DS136/11 (Feb. 28, 2001).

<sup>305</sup> EUROPEAN COMMISSION, REPORT ON US BARRIERS TO TRADE AND INVESTMENT 48 (2004), [http://trade-info.cec.eu.int/doclib/docs/2006/february/tradoc\\_121929.pdf](http://trade-info.cec.eu.int/doclib/docs/2006/february/tradoc_121929.pdf) (last visited Mar. 16, 2006).

<sup>306</sup> Council Regulation (EC) No 2238/2003 of 15 December 2003 protecting against the effects of the application of the United States Anti-Dumping Act of 1916, and actions based thereon or resulting therefrom, 2003 O.J. (L333) 1.

requested that the Dispute Settlement Body authorize it to suspend the application of obligations under GATT 1994 and the Antidumping Agreement.<sup>307</sup> Therefore, another arbitration under Article 22.6 of DSU<sup>308</sup> was requested on this matter and the EC was authorized to suspend the obligations at a quantified level not exceeding that of the nullification or impairment caused by the U.S. practice.<sup>309</sup> Finally, in the second week of October 2004, the repeal of the 1916 Act was attached to a miscellaneous trade bill and signed into law on December 3, 2004.<sup>310</sup> The 1916 Act is therefore fully repealed but the pending cases are allowed to proceed.<sup>311</sup>

## **B. Foreign Trade Barriers Investigation Rules<sup>312</sup> in China**

### **1. An overview**

The Ministry of Commerce has made big efforts to promote the enforcement of the *Foreign Trade Barriers Investigation Rules*. In order to improve enterprises' awareness of foreign trade barrier, the Ministry maintains on its official website a database containing general information as well as alerting information on foreign trade barriers.<sup>313</sup> There is also a channel on this website for industries and enterprises to report information relevant to trade barriers to

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<sup>307</sup> Recourse by the European Communities to Article 22.2 of the DSU, *United States—Anti-Dumping Act of 1916*, WT/DS136/15 (Jan.11, 2002).

<sup>308</sup> DSU, *supra* note 233, at art.22.6.

<sup>309</sup> Decision on the Arbitration under Article 22.2 of the DSU, *United States—Anti-Dumping Act of 1916*, WT/DS136/ARB (Feb. 24, 2004).

<sup>310</sup> The Miscellaneous Trade and Technical Corrections Act of 2004, Pub.L. 108-429, Title II, § 2006(a), 118 Stat. 2597.

<sup>311</sup> 1916 Act Report, *Supra* note 280. This report said that there have been three cases involving EC companies since the initiation of the WTO proceeding, two of which were started after the 1916 Act was declared WTO incompatible.

<sup>312</sup> Foreign Trade Barriers Investigation Rules, *supra* note 5.

<sup>313</sup> Barriers on Trade and Investment, <http://gpj.mofcom.gov.cn/z/z.html> (last visited Mar. 16, 2006).

the Ministry of Commerce.<sup>314</sup> Moreover, the Ministry of Commerce provides various training opportunities regarding foreign trade barriers for the local government agencies, industry associations and enterprises.

What is more important is the establishment of an interactive mechanism among the central government, local government agencies, industry associations and enterprises.<sup>315</sup> Under this mechanism, the four parties have separate responsibilities whereas they cooperate with each other. The central government is responsible for negotiation and dispute settlement with foreign countries so as to create and maintain a level playing field for domestic enterprises. The local government agencies are responsible for promoting information exchange between central government and private sector, carrying out or assisting in investigations, participating in negotiation with foreign countries, etc. The industry associations' role is especially important in the mechanism. They are the guard of their member enterprises' interests. They can file complaints on behalf of member enterprises. They can provide technical assistance for member enterprises. They are an important medium for the information exchange and collection. They can also play an active role in negotiations with foreign countries. The enterprises are directly interested parties in challenging foreign trade barrier. They are the sources of first-hand information needed in the investigation. They are also the most vigilant in highlighting the unfair trade practice in foreign countries.

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<sup>314</sup> *Id.*

<sup>315</sup> China Has Done a Good Job in Responding to Trade Conflict, <http://bgt.mofcom.gov.cn/aarticle/xxfb/200601/20060101363167.html> (last visited Mar. 16, 2006).

There has been only one investigation so far initiated under the *Foreign Trade Barriers Investigation Rules* that is illustrated below.

**2. A successful case under the *Foreign Trade Barriers Investigation Rules*:  
Japan—Measures Restricting the Import of Laver<sup>316</sup>**

Japan has the biggest consumer market for laver in the world, with a consumption need of about 10 billion pieces of laver and laver processed products per year.<sup>317</sup> However, the import of these products to Japan is subject to quotas, which had been granted only to Korea for a long period of time. Chinese laver exporters had never obtained such quotas before this case.<sup>318</sup>

On February 25, 2004, Jiangsu Province Laver Association filed a complaint concerning Japan's measures restricting the import of laver and laver processed products pursuant to the *Foreign Trade Barriers Investigation Rules*.<sup>319</sup> The complainant alleged that Japan's quota measures on the import of laver violated certain provisions of relevant WTO agreement and prevented Chinese laver from entering Japanese market.<sup>320</sup> The complainant therefore contended that the Japan's measures constituted a foreign trade barrier.<sup>321</sup>

The Ministry of Commerce considered that the complaint met the requirement imposed by the *Foreign Trade Barriers Investigation Rules* and therefore initiated an investigation on April

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<sup>316</sup> The Ministry of Commerce Announcement No. 16, 2004, *supra* note 98.

<sup>317</sup> China Appreciates the Adjustment of Japan Regulation on Importation Quota of Laver (May 30, 2005), <http://pep.mofcom.gov.cn/aarticle/guonyw/200502/20050200358116.html> (last visited Mar. 16, 2006).

<sup>318</sup> *Id.*

<sup>319</sup> The Ministry of Commerce Announcement No. 16, 2004, *supra* note 98.

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

22, 2004.<sup>322</sup> A notice of initiation of this investigation was published on the *Gazette of the Ministry of Commerce*, which set the time limit for the interested parties and public to submit written review as 30 days within the publication of the notice.<sup>323</sup> The Ministry of Commerce also notified the complainant and Japanese government of the decision.<sup>324</sup> Afterwards, questionnaires were sent to the relevant Japanese government agencies and domestic enterprises respectively.<sup>325</sup> The Ministry of Commerce also sent staff to Japan to collect information and evidence.<sup>326</sup> Furthermore, the two countries held three rounds of negotiations in which Japan finally promised to take measures to resolve this issue.<sup>327</sup> With the aim of pursuing mutually satisfactory solution, the Ministry of Commerce decided to suspend the investigation.<sup>328</sup> Through the negotiation afterwards, Japan adjusted the measures concerned. On February 21, 2005, Japan declared the import quota plan for laver in 2005, which cancelled the limitation on the origin of laver and laver processed products.<sup>329</sup> That is to say, Japan opened its market to Chinese laver. Consequently, the Ministry of Commerce terminated the investigation pursuant to the *Foreign Trade Barriers Investigation Rules*.<sup>330</sup> The effect of the case is immediate. On

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<sup>322</sup> *Id.*

<sup>323</sup> *Id.*

<sup>324</sup> The Ministry of Commerce Announcement No. 65, 2004, Suspension of the Investigation on Japan Restriction Measures of Laver Importation (Oct. 21, 2004), <http://www.mofcom.gov.cn/aarticle/b/c/200410/20041000294723.html> (last visited Mar. 16, 2006).

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> The Ministry of Commerce Announcement No.10, 2005, Termination of the Investigation on Japan Restriction Measures of Laver Importation, <http://www.mofcom.gov.cn/aarticle/b/c/200502/20050200019196.html> (last visited Mar. 16, 2006).

<sup>330</sup> *Id.*

July 3, 2005, 60 million pieces of laver departed from Nantong for Japan for the first time.<sup>331</sup>

In 2005, the total amount of laver export from Jiangsu Province soared by 70 times.<sup>332</sup>

### C. Comparison

The authorities in both the EU and China have played an active role in the implementation of the law. They have done a lot of things in order to improve the private sector's awareness of the two procedures. Although the two procedures are not the only path leading to the elimination of foreign trade barriers, their function of forging public-private partnership is undeniable.<sup>333</sup> Admittedly, there exist some challenges, especially in China, if this function has to be fully realized. Chinese firms tend to be more wary of litigation. They are still not comfortable with employing private law firms to work with trade officials in challenging foreign trade barriers. Moreover, China still lacks legal expertise in WTO law.<sup>334</sup> The capacity to organize information concerning trade barriers also has to be improved. All of these problems are what the Chinese government should confront in the future.

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<sup>331</sup> Japan Barrier on Importation of Laver was Removed and Laver Export from Jiangsu Province Soared by 70 Times, <http://www.mofcom.gov.cn/aarticle/o/dg/200602/20060201515223.html> (last visited Mar. 16, 2006).

<sup>332</sup> *Id.*

<sup>333</sup> See SHAFFER, *supra* note 3, at 20; Eeckhaute, *supra* note 50, at 210; Bronckers, *supra* note 18, at 461.

<sup>334</sup> Chengyan Lu, *Legal Services in China: Facing the WTO*, 20 UCLA PAC. BASIN L.J. 278, 25 (2003).

## Chapter VIII. Conclusions

As discussed above, many similarities exist between the TBR and *Foreign Trade Barriers Investigation Rules*. They both establish a procedure for the private sector to petition the government to challenge foreign trade barriers. Both procedures apply to violation and non-violation situations. Both procedures contain similar stages ranging from lodging of a complaint to the adoption of follow up actions. The complainants and other interested parties in both procedures are guaranteed certain procedural rights. The authorities under both procedures have obligations of publishing and informing their decisions so as to improve transparency. In addition, a mutually agreeable solution is preferred by both procedures.

On the other hand, the two pieces of law differ from each other in some aspects. First, their coverage is different. The TBR is clearly intended to “ensure the exercise of the Community’s rights under international trade rules”.<sup>335</sup> Therefore, the obstacles to trade include only trade practice adopted or maintained by a third country in respect of which EU derives a right of action under international trade rules. In contrast, trade barriers under the *Foreign Trade Barriers Investigation Rules* are broader. They cover not only violation and non-violation situations, but also trade practice that is not yet subject to any international trade rules but satisfies the “negative impact test.” Second, the TBR clearly states that the EU’s international

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<sup>335</sup> Council Regulation 3286/94, *supra* note 4, at art. 1.

obligations on dispute settlement will be observed in the adoption of commercial policy measures. Therefore, any action taken pursuant to the TBR will be consistent with international trade rules. The approach in the *Foreign Trade Barriers Investigation Rules* deviates from that of the TBR. It grants the Ministry of Commerce certain discretion to adopt measures. Whether or not intended, this runs the risk of violating China's obligations under international agreements. The third difference exists in the burden of proof for the complainants. Under the *Foreign Trade Barriers Investigation Rules*, the complainant's burden of proof is much lower. This is reasonable due to lack of expertise and different attitudes towards litigation in China.

In addition, this article suggests some improvements for the *Foreign Trade Barriers Investigation Rules*. First, the provisions on the adoption of measures should be modified so as to be consistent with China's international obligations on dispute settlement. Second, the definition of domestic enterprises and industry should be further clarified. Third, a definition of the term "interested parties" should be added. Fourth, the procedural rights of the complainants and interested parties should be strengthened.

**Annex: Cases under the TBR<sup>336</sup>**

<b>Symbol/Date of Initiation</b>	<b>Complainants</b>	<b>Target Country / Practices</b>	<b>Actions taken</b>
C228/6 Sep.17,2005	CEEV & CEPS on behalf of Community enterprises	India—Import duties and restrictions on wines and spirits	Investigation not concluded yet.
C261/3 Oct.23,2004	Scotch Whisky Ass'n on behalf of its 54 member companies	Uruguay—Tax arrangements concerning imported whiskies	Suspended as a result of a negotiated resolution.
C3/2 Jul.01,2004	BIPAVER on behalf of its member companies	Brazil—Import ban on retreaded tyres	Consultation/panel requested but no panel established yet. (WT/DS332)
C311/31 Dec.20,2003	EFPIA on behalf of Community enterprises	Turkey—Pharmaceutical products	Settlement is being pursued through negotiation.
C58/3 Mar.13,2003	European Oilseed Alliance	U.S.—Subsidies on oilseed production	Situation being monitored as a result of insufficient evidence.
C124/6 May 25,2002	CIVB on behalf of Community enterprises	Canada—Lack of protection of geographical indications for “Bordeaux” and “Medoc”.	Terminated as a result of a mutually agreed solution.
C215/2 Aug.01,2001	FICF on behalf of Community enterprises	U.S.—Restriction on the prepared mustard	Terminated as a result of insufficient evidence.
C345/5 Dec.2,2000	CESA on behalf of shipbuilding industry & enterprises	Korea—Measures affecting trade in commercial vessels	Panel report adopted. (WT/DS273/R) EC prevailed.
C236/4 Aug.18,2000	Volkswagen AG, Seat SA & Audi AG	Columbia—Tax discrimination of imported motor vehicles	Suspended as a result of a mutually agreed solution.
C340/70	European Apparel &	Argentina—Imports of	Settlement is being

<sup>336</sup> See Official Journal of the European Communities; Trade Barriers Regulation: List of Cases, [http://Europa.eu.int/comm/trade/issues/respectrules/tbr/cases/cases\\_list\\_en.htm](http://Europa.eu.int/comm/trade/issues/respectrules/tbr/cases/cases_list_en.htm) (last visited Mar. 16, 2006).

Nov.27,1999	Textile Organization on behalf of Community enterprises	textile and clothing products	pursued through negotiation.
C218/3 Jul.30,1999	EFPIA on behalf of Community enterprises	Korea—Pricing and Reimbursement of Pharmaceutical products	Suspended as a result of measures taken by Korea.
C176/6 Jun.22,1999	Consorzio del Prosciutto di Parma on behalf of member companies	Canada—Lack of protection of geographical indication for “Prosciutto di Parma”	On hold pending the outcome of the Canadian proceedings concerned.
C108/33 Apr.17,1999	Dornier Luftfahrt GmbH	Brazil—Subsidies for export of regional aircraft	Terminated as a result of measures taken by Brazil.
C361/13 Nov.24,1998	Cerestar Holding BV on behalf of member companies	Brazil—Import regime for sorbitol	Suspended as a result of measures taken by Brazil.
C215/2 Jul.10,1998	ANAPA on behalf of Community industry and enterprises	Chile—Restriction on the transit and transshipment of swordfish	Constitution of WTO panel suspended(WT/DS193)
C154/12 May 19,1998	Colipa on behalf of member firms	Korea—Import restriction on cosmetic products	Suspended as a result of an agreement reached by the EC and Korea.
C63/2 Feb.27,1998	Febeltex on behalf of Community enterprises	Brazil—Import regime for textile products	Suspended as a result of measures taken by Brazil.
C 197/2 Jun.27,1997	Eurofer on behalf of member companies	Brazil—Import licensing of stainless steel flat products	Terminated as a result of satisfactory measures taken by Brazil; Consultation requested but no panel established(WT/DS116).
C 177/5 Jun.11,1997	IMRO on behalf of member companies	U.S.—Licensing of musical works	Panel report adopted (WT/DS160/R). EC prevailed.
C 110/2	Cotance on behalf of	Japan—Imports of	Consultation

Apr.9,1997	Community enterprises	finished leather	requested but no panel established. (WT/DS147)
C 103/3 Apr.2, 1997	BNIC on behalf of Community enterprises	Brazil—Cognac appellation of origin	Terminated as a result of satisfactory measures taken by Brazil.
C 59/6 Feb.26,1997	Cotance on behalf of Community enterprises	Argentina—Exports of hides and imports of finished leather	Panel report adopted. (WT/DS155/R) EC prevailed.
C 58/14 Feb.25,1997	Eurofer on behalf of member companies	U.S.—Antidumping Act of 1916	AB report adopted. (WT/DS136/AB/R) EC prevailed.
C351/6 Nov.22,1996	Federtessile on behalf of Community enterprises	U.S.— Rules of origin for textile products	Consultation requested(WT/DS85) ; Solution reached through negotiation.

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