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Private Response to Foreign Unfair Trade Practices--United States and EEC Complaint Procedures

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ARTICLES

Private Response to Foreign Unfair Trade Practices— United States and EEC Complaint Procedures

*Marco C.E.J. Bronckers**

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This article is dedicated to the memory of Dr. Jan Tumlin (1926-1985), a free and guiding spirit in international trade.

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I. INTRODUCTION

Of recent years there is a movement in the international economic area towards limiting public discretion in handling private complaints about foreign unfair trade practices. This movement manifests itself particularly in the United States and, to a lesser extent, in the European Economic Community (the "EEC" or the "Community"). Procedures have been developed through which private petitioners can request their national government to investigate and, if need be, retaliate against unfair trade actions of foreign countries. This contribution analyzes these procedures, as they have been established in the United States and the EEC. It will conclude that they not only serve to protect individual interests in international trade policy, but also reinforce the liberal trade principles developed since the Second World War in the context of GATT (the General Agreement on Tariffs and Trade¹).

The following example illustrates the difficulties facing the business community in challenging a trade restriction abroad.

Suppose a Dutch exporter of cheese ("X") learns about a proposal for a United States regulation affecting the labelling of his products. X fears this regulation will restrict his export opportunities to the United States, because the new requirements are likely to create confusion and uncertainty in the minds of United States consumers. Moreover, X believes the proposed regulation does not conform to the Standards Code negotiated during the GATT Tokyo Round concluded in 1979.² The

¹ General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (hereinafter referred to as "GATT"). GATT law is authoritatively discussed in J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1969). The interrelationships between GATT law on the one hand, and the United States and European Community law on the other, are lucidly brought out in E. MCGOVERN, *INTERNATIONAL TRADE REGULATION: GATT, THE UNITED STATES AND THE EUROPEAN COMMUNITY* (1982 & Supp. 1983).

² For an evaluation of the Tokyo Round (also referred to as "MTN") negotiations within the GATT framework, see Jackson, *The Birth of the GATT-MTN System: A Constitutional Appraisal*, 12

federal agency which has drafted the regulation disagrees with X's assertion, however, and is unwilling to make an exception for X's products.³ In his subsequent attempts to challenge the final regulation, X confronts the following obstacles.

The title of the Trade Agreements Act of 1979 which implements the Standards Code (the "Code") states encouragingly that no federal agency may engage in any standards-related activity that "creates unnecessary obstacles to the foreign commerce of the United States."⁴ Yet that does not help X very much. The statute provides just one exclusive remedy. Governments, and governments only, may direct complaints to the Office of the United States Trade Representative ("USTR"),⁵ which is responsible for the international trade policy issues that arise under the Code.⁶

Furthermore, the statute expressly bars the construction of any private cause of action against standards-related activities in the United States, involving allegations that they violate United States obligations under the Standards Code.⁷ This is in line with the general position taken by Congress that none of the GATT Codes negotiated during the Tokyo Round ought to have domestic law (*i.e.*, self-executing) effect in

LAW & POL'Y INT'L BUS. 21 (1980). The text of the Standards Code (officially called "The Agreement on Technical Barriers to Trade") is reproduced in GATT, 26th Supp. BISD 8 (1980). In the United States, the Standards Code is implemented through sections of the Trade Agreements Act of 1979, 19 U.S.C. §§ 2531-2573 (1984). In the EEC the Standards Code is implemented through Decision 80/45/EEC, 23 O.J. EUR. COMM. (No. L 14) 36 (1980). For commentaries on the Standards Code from different perspectives, see Bourgeois, *The Tokyo Round Agreements on Technical Barriers and on Government Procurement in International and EEC Perspective*, 19 COMMON MKT. L. REV. 5 (1982), Comment, *Technical Analysis of the Technical Barriers to Trade Agreement*, 12 LAW & POL'Y INT'L BUS. 179 (1980).

³ X would have had to approach this agency informally, because no federal agency may consider a formal complaint or petition against a United States standard regarding an imported product. 19 U.S.C. § 2561 (1982). Federal agencies, however, generally allow interested parties to submit written comments to proposed regulations before they are adopted. See, e.g., Food and Drug Administration, *Cheeses and Related Cheese Products; General Standards of Identity for "Certain Other Cheeses"*. 49 Fed. Reg. 17,018, 17,039 (to be codified at 21 C.F.R. pt. 133) (proposed Apr. 20, 1984).

⁴ 19 U.S.C. § 2532 (1982). Note that standards-related activities are not deemed to constitute an unnecessary obstacle to the foreign commerce of the United States if the "demonstrable purpose" of this activity is to achieve a "legitimate objective" (e.g., the protection of health or consumer interests) and if such activity "does not operate to exclude imported products which fully meet the objectives of such activity." 19 U.S.C. § 2531 (1982).

⁵ 19 U.S.C. § 2552 (1982). This section also allows non-signatory governments, who extended rights and privileges to the United States which are substantially equivalent to those contained in the Standards Code, to submit complaints about Standards Code violations to the United States Trade Representative (hereinafter referred to as "USTR"). See generally Comment, *supra* note 2, at 209-11 (describing United States implementation of the Standards Code's dispute settlement provisions).

⁶ 19 U.S.C. § 2541 (1982).

⁷ 19 U.S.C. § 2551 (1982).

the United States.⁸ Thus X cannot very well expect United States courts to review the disputed regulation against the Code's norms.

Since United States law does not seem to offer a basis to challenge the standard restricting the sale of his products in the United States market, X considers submitting a complaint in Geneva with the Surveillance Committee established by the Standards Code.⁹ In overseeing the implementation of the Code by its signatories, the Surveillance Committee lends assistance in the settlement of disputes between them.¹⁰ Private complainants, however, have no standing before the Surveillance Committee.¹¹ Consequently, should X approach the Committee, the Committee would not entertain his complaint.

In sum, X's only recourse would be to request his government to intervene. Because of the Community's exclusive powers in international trade matters, the Dutch government would have to refer X to the Community authorities in Brussels.¹² Yet before the adoption of the EEC complaint procedure in September 1984, the Community authorities were not obliged to investigate X's complaint, and to the extent they did, they had complete discretion in deciding how and when they would dispose of his case.

X's odyssey epitomizes the position of those exporters who, relying on GATT norms, seek to overturn trade barriers they encounter in foreign countries. National courts rarely have granted GATT provisions the force to invalidate conflicting domestic law.¹³ In 1947, the GATT's drafters briefly considered the possibility of direct citizen access to an international trade organization, but this idea was quickly rejected at the time¹⁴ and has not made much headway since.¹⁵

⁸ See 19 U.S.C. § 2504(a) and (f) (1982).

⁹ GATT, 26th Supp. BISD 22 (1980) (art. 13 of the Standards Code).

¹⁰ GATT, 26th Supp. BISD 22-26 (1980) (art. 14 of the Standards Code).

¹¹ *Id.*

¹² See *infra* text accompanying notes 241-43.

¹³ See generally Petersmann, *Application of GATT by the Court of Justice of the European Communities*, 20 COMMON MKT. L. REV. 397 (1983) (criticizing the Court's decision not to grant direct effect to certain GATT provisions). See also Bourgeois, *Effects of International Agreements in European Community Law: Are the Dice Cast?*, 83 MICH. L. REV. 2201, 2217-18 (1984) (defending the Court's decision not to grant direct effect to GATT provisions). In his study, Petersmann briefly reviews the application of GATT by United States and Japanese courts. Petersmann, *supra* at 418 n.53. Detailed analyses of GATT's status in United States domestic law and application by United States (federal and state) courts may be found in Hudec, *The Legal Status of GATT in the Domestic Law of the United States*, in GATT AND THE EUROPEAN COMMUNITY (Hilf & Petersmann eds., to be published by Kluwer in 1986 in its series Studies in Transnational Economic Law); Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249 (1968).

¹⁴ "At the time the fear of the 'supernational' was as great as the fear of the 'supernatural' and the theory of governmental sovereignty prevented any serious consideration of direct relations to

Recently, certain countries have designed bilateral consultation mechanisms with a view to amicably resolving complaints of exporters. A notable example is the Joint U.S.-Japan Trade Facilitation Committee ("TFC"), established in 1977.¹⁶ The TFC is a government-to-government forum which admits and investigates private complaints about Japanese government practices (e.g., customs procedures and product approval procedures) restricting United States exports to Japan. First, a United States exporter approaches the United States Department of Commerce ("Department"). The Department may open a "case file" and raise the matter in the TFC's Washington Support Group (consisting of Commerce officials and Japanese embassy personnel). The Tokyo Group (consisting of Ministry of International Trade and Industry ("MITI") officials and United States embassy personnel) may subsequently become involved in seeking a resolution of the complaint. The Senior Review Committee, co-chaired by the Assistant-Secretary of Commerce and the Director-General of the Trade Administration Bureau of MITI,¹⁷ provide overall guidance to the TFC process.

The TFC mechanism is rather loosely structured. Private complainants fully depend upon the willingness of the Commerce Department to initiate a TFC investigation, the outcome of which is contingent on the willingness of the Japanese government to change its practices. Moreover, the TFC process does not work under any time constraints, nor is it subject to public scrutiny. Through the years, TFC has come to focus on company-specific problems in basic industries, such as the chemical and metal industry.¹⁸

Japan, often accused of shielding its market against import competition, in 1982 took the unusual step of creating an "ombudsman" for the purpose of settling grievances from foreign business related to the degree of openness of the Japanese market and its import inspection procedures. The Office of the Trade Ombudsman (the "OTO") acts under the author-

individual persons." J. JACKSON, *supra* note 1, at 187. Among international organizations GATT is no exception in this respect, since no international organization will interpret its law at the request of a private party. H. SCHERMERS, *INTERNATIONAL INSTITUTIONAL LAW* 681 (2d ed. 1980).

¹⁵ See *infra* text accompanying notes 382-90 (containing proposals for a private right to petition GATT, through which a preliminary interpretation of certain GATT principles may be requested).

¹⁶ See generally Weil & Glick, *Japan—Is the Market Open? A View of the Japanese Market Drawn from U.S. Corporate Experience*, 11 *LAW & POL'Y INT'L BUS.* 845, 859-902 (1979) (analyzing TFC's "case law" generated in the first years of its existence).

¹⁷ *Id.* at 860 n.94.

¹⁸ Telephone interview with McClellan DuBois, Special Assistant to the United States Undersecretary of Commerce (Oct. 31, 1984). Complaints of high technology industries against Japanese trade practices are handled by the "High Technology Working Group," a separate structure co-managed by the United States Department of Commerce and the Office of the United States Trade Representative.

ity of a Deputy Chief Cabinet Secretary, in cooperation with the ministries involved in a particular complaint.¹⁹ More than two years after its establishment, however, foreign observers judge the OTO to be a qualified success at best.

The Japanese ombudsman does not have independent authority to settle complaints, but merely passes them on to the agency which does have jurisdiction over the matter. Many corporations with subsidiaries in Japan are reluctant to approach the OTO because of the possibility of losing goodwill, and prefer to rely on their own contacts within the different ministries. OTO officials have a short-term position with the ombudsman's office, which has led some to believe that they will be reluctant to urge foreign complaints upon their prospective employers (*i.e.*, the ministries concerned).²⁰ Significantly, the number of complaints submitted to the OTO recently has dropped.²¹

In those instances where informal settlement processes do not give satisfaction to private complainants, the complainants will be dependent on their government's support to press objections against foreign trade barriers, either bilaterally or before the appropriate international forum. The discretion a government traditionally enjoyed in pursuing a private complaint on the intergovernmental plane can be appreciated if one considers the institution of diplomatic protection.

This classic institution is connected with state responsibility for infringements of individual rights of aliens (*e.g.*, unlawful detention or expropriation without payment of fair compensation).²² The affected person (natural or legal) may turn to his national government and request protection. If his national government takes up his claim and intervenes with the foreign state, this action is deemed an exercise of diplomatic protection. Nowadays it is generally accepted that governments are under no duty to exercise diplomatic protection.²³ The com-

¹⁹ See generally Okita, *Role of the Trade Ombudsman in Liberalizing Japan's Market*, 7 *WORLD ECON.* 241, 249-50 (1984).

²⁰ Kreutzer, *Japanese Ombudsman voor Handelsproblemen Heeft Weinig Macht*, Elseviers Weekblad, May 12, 1984, at 24.

²¹ *Id.*; *Why the Japanese trade nut is still tough to crack*, Financial Times (London), September 17, 1984, at 5 (citing a 1983 survey conducted by the Japanese government which found that only a third of those foreign concerns with grievances bothered to file them with the O.T.O.).

²² See generally J. STARKE, *INTRODUCTION TO INTERNATIONAL LAW* 293-301 (9th ed. 1984). The term "diplomatic protection" was introduced by the United States scholar E.M. Borchard in his pioneering work *DIPLOMATIC PROTECTION OF CITIZENS ABROAD* (1915).

²³ C. ROUSSEAU, *DROIT INTERNATIONAL PUBLIC* 116 (10th ed. 1984); *RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* § 212 (1965). The government's discretion in exercising diplomatic protection has been endorsed by the International Court of Justice. Case concerning the Barcelona Traction, Light and Power Company, Ltd. (Belgium v. Spain), 1970 I.C.J. 1, 44 (judgment of Feb. 5, 1970).

mon view is that the State does have discretion in weighing the national interest against the private claim in order to take into account a variety of factors such as the proportionality of the importance of the claim against the resources required to resolve the issues it presents, the priorities involved in selecting one claim over another, and, perhaps most significantly, the political implications resulting from an exercise of diplomatic protection.

These factors also play a role when a private petitioner requests that a government take up his complaint with respect to foreign unfair trade practices.²⁴ Yet unfettered public discretion in this area has come under attack by exporters and academic observers. Where it concerns international trade, governments actually stimulate citizens to venture outside their national territory in promoting export activities. By way of reassurance, governments often remind both exporters and potential exporters of specific commitments to liberalize international trade which many nations have undertaken in the context of GATT. In practice, however, the enforcement of these commitments leaves much to be desired because it undermines the liberal trading framework, and also acts to the detriment of the business community, which sees its investment in export activities imperiled.

The discrepancies perceived in international commitment and national compliance have incited many exporters, supported by academic

²⁴ This has led me to argue on an earlier occasion that such a request must be regarded as an appeal for diplomatic protection. Bronckers, *A Legal Analysis of Protectionist Measures Affecting Japanese Imports into the European Community*, in PROTECTIONISM AND THE EUROPEAN COMMUNITY 54, 68 (Völker ed. 1983). Upon further reflection, however, I believe this transposition is inappropriate, given the differences in context between the institution of diplomatic protection (*i.e.*, protection of rights of aliens) and the complaints about foreign unfair trade practices.

These differences are reflected in the GATT framework for dispute settlement, which does not contain requirements similar to those pertaining to an exercise of diplomatic protection. For example, it is still a rule of public international law, albeit with certain qualifications, that a state claim on behalf of one of its citizens abroad is not admissible unless this citizen has exhausted the local remedies in the foreign state which is alleged to have injured him. *See generally* STARKE, *supra* note 22, at 299-301; I. BROWNIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 495-505 (3d ed. 1979). GATT's dispute settlement provisions (Articles XXII and XXIII) do not set forth such a requirement. These provisions are discussed *infra* text accompanying notes 35-46. A Contracting Party may request consultations with another party (which must afford sympathetic consideration to such request) and may submit its complaints to the GATT membership regardless of whether the individual trader who was affected by the disputed practice and who brought this matter to his government's attention exhausted the legal remedies available to him in the jurisdiction of the respondent party.

In short, GATT law does not contain a local remedies rule, and no instances have been reported where this issue was raised in dispute settlement proceedings. One should recognize, though, that exhaustion of local remedies may be prescribed by *national law* in connection with procedures allowing private petitioners to complain of foreign unfair trade practices. *See infra* text accompanying note 137.

observers, to insist on private participation in the enforcement of international trade agreements.²⁵ In the early 1960s this movement led to the introduction of a provision in United States trade legislation allowing the business community to request public hearings on foreign trade barriers. Gradually, these provisions have evolved into a full-fledged complaint procedure, limiting the Executive's latitude in investigating and pursuing a private complaint on the intergovernmental level. Yet it is important to note that this procedure maintains the Executive's discretion to decide whether or not at the outset to take retaliatory measures against the foreign government concerned, even if the private complaint is found to be justified. Only recently, but mainly for different reasons, the EEC adopted a similar private complaint procedure.

This article will consider the effect of private complaint procedures on trade relations between GATT contracting parties. It will first address the complaint procedure established by Section 301 of the U.S. Trade Act of 1974 ("Section 301"). Following a survey of the scope of the Executive's retaliatory authority, this article will sketch the history of the private remedy created by Section 301. Next the discussion will focus on three procedural themes: (i) the requirements private complainants must meet in order to successfully invoke Section 301, (ii) the relief private complainants can expect once the United States government takes up their complaints and (iii) the position of Section 301 vis-à-vis other private remedies in United States trade law, particularly with regard to the United States domestic market. This article will then examine the origin and outlook of the novel Community complaint procedure ("the EEC instrument"), which Section 301 fomented, with reference to the themes outlined above. Finally, this study will appraise both the potential and the pitfalls of private involvement in the enforcement of GATT commitments.

At the outset it should be pointed out that the term "unfairness", as it is used in this article, does not denote uniform normative standards. It will be seen, for example, that trade practices which can be considered unfair according to United States law may go unchallenged when judged according to GATT norms. Indeed, one of the objectives of this study is to inquire whether United States and EEC notions of unfair trade practices correspond with the fair trading standards developed in GATT.

²⁵ Jackson, *United States—EEC Trade Relations: Constitutional Problems of Economic Interdependence*, 16 COMMON MKT. L. REV. 453, 477 (1979) ("(I)t may no longer be possible to carry on economic international relations by traditional or habitual diplomatic techniques . . . Perhaps what is needed is to develop national structures which allow citizen participation and consensus building on international trade policy in conjunction with counterpart constituencies and citizens from other nations") (emphasis in original).

The sequel of this inquiry is to determine whether the response to foreign unfair trade practices, as envisaged by United States and EEC domestic law, conforms with GATT procedures. With this in mind, it seemed convenient to use the term "foreign unfair trade practices" in a descriptive sense, without distinguishing its differing content at all times.

II. UNITED STATES COMPLAINT PROCEDURE EMBODIED IN SECTION 301

This chapter of the article will focus on the procedural innovations wrought by Section 301, which allows private complainants to trigger intervention by the United States government against foreign unfair trade practices. Yet Section 301 also merits consideration from another angle, the extent to which Congress has delegated authority to the Executive to retaliate against foreign trade practices which it deems to be unfair.²⁶ Through Section 301 Congress empowered the President to take action against foreign governments engaging in unfair trade practices both at the request of a private complainant and on his own motion.²⁷ Before broaching an analysis of the procedural aspects of the private remedy created by Section 301, this article will indicate briefly the scope of the Executive's retaliatory authority.

A. Scope of the Executive's Retaliatory Authority

In 1794, Congress authorized President George Washington to restrict the imports from and exports to foreign countries, whenever he felt that these countries discriminated against United States commerce.²⁸ Congress repeatedly reaffirmed this grant of authority.²⁹ At a time when international standards of fairness in trade were not well-developed, with the exception of certain rudimentary notions expressed in bilateral Friendship-Commerce-and-Navigation ("FCN") treaties, essentially the Executive was called upon to exercise its own judgment on the propriety and expedience of retaliatory action.

In the GATT, however, the international trading community has articulated standards of fairness, while providing for dispute settlement procedures in case objection is made against practices of a contracting

²⁶ Congress has the power to regulate United States international trade policy. "The Congress shall have Power . . . (t)o regulate Commerce with foreign Nations . . ." U.S. CONST. art. I, § 8.

²⁷ 19 U.S.C. § 2411(a)(1), *amended by* Trade and Tariff Act of 1984 § 304, Pub. L. 98-573 (1984).

²⁸ Fisher & Steinhardt, *Section 301 of the Trade Act of 1974: Protection for U.S. Exporters of Goods, Services, and Capital*, 14 LAW & POL'Y INT'L BUS. 569, 573 n.18 (1982).

²⁹ See generally Gadbow, *Reciprocity and its Implications for U.S. Trade Policy*, 14 LAW & POL'Y INT'L BUS. 691, 702-09 (1982); Fisher & Steinhardt, *supra* note 28, at 573.

party which allegedly violate these standards. The question then arises whether action under Section 301 is limited to GATT-related issues and should conform with GATT procedures. This article will show that Congress has extended the scope of the Executive's retaliatory authority beyond GATT rules.

1. Extension: Beyond GATT Nullification or Impairment

Section 301 currently empowers the President:

- (A) to enforce the rights of the United States under any trade agreement, or
- (B) to respond to any act, policy or practice of a foreign country or instrumentality that
 - (i) is inconsistent with the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or
 - (ii) is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce.³⁰

While the quoted language dates from the Trade Agreements Act of 1979, Congress expressly defined the meaning of the catch-words "unjustifiable, unreasonable or discriminatory" for the first time in the Trade and Tariff Act of 1984 as follows:

Unreasonable.—The term "unreasonable" means any act, policy, or practice which, while not necessarily in violation of or inconsistent with the international legal rights of the United States, is otherwise deemed to be unfair and inequitable. The term includes, but is not limited to, any act, policy, or practice which denies fair and equitable—

- (A) market opportunities;
 - (B) opportunities for the establishment of an enterprise;
- or
- (C) provision of adequate and effective protection of intellectual property rights.

Unjustifiable.—

- (A) *In general.* The term "unjustifiable" means any act, policy, or practice which is in violation of, or inconsistent with, the international legal rights of the United States.
- (B) *Certain actions included.* The term "unjustifiable" includes, but is not limited to, any act, policy, or practice described in subparagraph (A) which denies national or most-favored-nation treatment, the right of establishment, or protection of intellectual property rights.

Definition of discriminatory.—The term "discriminatory" includes, where appropriate, any act, policy, or practice which denies national or most-favored-nation treatment to United States goods, services or investment.³¹

The addition of these statutory definitions in 1984 was not meant to expand the President's authority established in the 1979 Act, but to clarify

³⁰ 19 U.S.C. § 2411(a)(1), amended by Trade and Tariff Act of 1984, § 304(a).

³¹ 19 U.S.C. § 2411(e), amended by Trade and Tariff Act of 1984, § 304(f)(2).

existing law and to emphasize certain particularly offensive foreign practices.³²

Through the inclusion of the "unreasonableness" criterion, Congress clearly extended the Executive's retaliatory authority beyond violations of the GATT codes of conduct.³³ The legislative history of the Trade Agreements Act of 1979, in explaining the "unreasonableness" criterion, referred to

*restrictions which are not necessarily inconsistent with trade agreements, but which nullify or impair benefits accruing to the United States under trade agreements or which otherwise restrict or burden U.S. Commerce (emphasis supplied).*³⁴

The clause, "which nullify or impair benefits," corresponds with the GATT's central dispute settlement provision, Article XXIII.³⁵ In Articles XXII and XXIII, the GATT has made arrangements to settle disputes, while indicating which governmental practices are deemed offensive in the context of GATT. Article XXII sets forth a general obligation for the GATT Contracting Parties to consult with one another at the request of any party. Such preliminary consultations are a prerequisite to formal dispute settlement proceedings pursuant to Article XXIII.

a. Establishing GATT nullification or impairment

Article XXIII of the GATT stipulates in paragraph 1 that

(a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, *whether or not it conflicts with the provisions of this Agreement*, or (c) *the existence of any other situation*

is actionable should a contracting party consider that

*any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired (emphasis supplied).*³⁶

³² S. REP. NO. 308, 98th Cong., 1st Sess. 45 (1983).

³³ Where reference is made hereafter to the GATT, this includes the Codes negotiated during the Tokyo Round. These Codes (relating to subsidies, dumping, customs valuation, government procurement, technical barriers to trade, and import licensing, apart from a number of sectoral arrangements and understandings), elaborate on provisions of the General Agreement. The texts of the Tokyo Codes are reproduced in GATT, 26th Supp. BISD 3-191 (1980). See *supra* note 2. This contribution does not examine the sectoral arrangements (concerning bovine meat, GATT, 26th Supp. BISD 84, certain dairy products, *id.* at 91, and civil aircrafts, *id.* at 162).

³⁴ S. REP. NO. 249, 96th Cong., 1st Sess. 234-35 (1979).

³⁵ See generally R. HUDEC, *THE GATT LEGAL SYSTEM AND WORLD TRADE DIPLOMACY* (1975); Hudec, *GATT Dispute Settlement After the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145 (1980).

³⁶ The Tokyo Codes on standards, GATT, 26th Supp. BISD 8, 22 (1980) (art. 14.2); government procurement, *id.* at 33, 49 (art. VII.4); subsidies, *id.* at 56, 71 (art. 12.3); dumping, *id.* at 171, 185 (art. 15.2); and customs valuation, *id.* at 116, 128 (art. 19.1) contain similar language, also making allowance for non-violation complaints. The Code on import licensing, *id.* at 154, 159 (art. 4.2),

If the disputing parties do not reach an amicable settlement of their differences, the complaining country may take its case to the entire GATT membership. Article XXIII does not provide for a particular procedure to be followed then, but it has become customary for the GATT Council (acting for the GATT Contracting Parties) to establish a panel which prepares a report analyzing the relevant issues and proposes resolutions. Yet it should be noted that a complaining party is not entitled to a panel proceeding. In the Understanding on Article XXIII procedures reached during the Tokyo Round, the signatories stopped short of granting a complaining party the right to a panel investigation.³⁷ This was a negotiating success for the EEC which had resisted proposals from the United States and Canada for automatic recognition of the right to a panel.³⁸

Panels operate as independent adjudicatory bodies, traditionally consisting of officials of governments who are not parties to the particular dispute. Many disagreements are settled by the disputing parties during the panel proceedings or on the basis of the panel report, before the GATT membership has even considered its findings. Should a complainant not be satisfied with the outcome of the settlement proceedings, however, the GATT Contracting Parties may take the rather unusual step of authorizing the complainant to retaliate against the other disputant if they consider that the circumstances are serious enough to justify such action.³⁹

does not make provision for an independent dispute settlement mechanism and refers to the relevant provisions in the General Agreement.

Complaints may also be warranted according to GATT, art. XXIII, para. 1, if a contracting party considers that "the attainment of any objective of the Agreement of being impeded." This extension does not add anything to the "benefits" formula. Hudec, *Retaliation Against "Unreasonable" Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment*, 59 MINN. L. REV. 461, 480 (1975).

³⁷ See Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance, GATT, 26th Supp. BISD 210 (1980), to which is annexed an Agreed Description of the Customary Practice of the GATT in the Field of Dispute Settlement (art. XXIII.2), *id.* at 215. These documents leave the impression that voluntary settlement of disputes is strongly favored, thus restraining the use of the panel procedure. Hudec, *supra* note 36, at 177-78. The GATT Ministerial Declaration adopted on Nov. 29, 1982 reaffirmed that "consensus will continue to be the traditional method of resolving disputes" although "obstruction in the process of dispute settlement shall be avoided." GATT, 29th Supp. BISD 9, 16 (1983) [hereinafter cited as GATT *Ministerial Declaration*].

In contrast, a complaining party is entitled to the establishment of a panel if the dispute falls within the terms of one of the Codes (with the exception of the Import Licensing Code).

³⁸ See EUR. COMM. COM. (79) 514 final, at 218 (1979).

³⁹ Only once in GATT history did the Contracting Parties formally approve of retaliatory action under GATT, art. XXIII. See *infra* text accompanying note 154.

In accordance with customary usage, capital initials in Contracting Parties refer to actions taken by the GATT's Contracting Parties acting jointly, in their capacity as the decision-making organ of the GATT organization. See GATT, art. XXV, para. 1. On the GATT's status as a *de*

The underscored phrases of Article XXIII demonstrate that the General Agreement allows complaints not only when its provisions are infringed, but also in "non-violation" cases where a contracting party feels its benefits under the Agreement are being nullified or impaired. A careful study of the drafting history of the nullification or impairment concept in the GATT has concluded that it "was not a definition at all, but rather a grant of common-law jurisdiction to fashion a definition as disputed cases arose."⁴⁰ Particularly in non-violation cases, this concept enables a case-by-case determination of acts which, even though they do not infringe on particular GATT provisions, offend the GATT membership. Practice reveals that non-violation nullification or impairment may be found when a contracting party denies certain benefits to its trading partner(s), even though the latter could have reasonably expected these benefits.⁴¹ This suggests a severe limitation on the possibilities of winning non-violation cases brought to the GATT forum, however, because these cases ultimately appeal to the GATT membership's sense of fairness.

Only if there is a strong consensus will an organization like the GATT be comfortable enough to declare non-violation practices of one of its members unfair.⁴² In addition, one can hardly expect the GATT membership to condemn the actions of one of its members, if other contracting parties on different occasions have engaged or engage in similar practices. If, moreover, the complaining party does not have "clean hands" with respect to the disputed practices, it may well be estopped to submitting a non-violation complaint under Article XXIII.⁴³ Not surprisingly, therefore, the vast majority of cases submitted to the GATT membership under Article XXIII center on alleged violations of express provisions of the General Agreement.⁴⁴

It is obvious, then, that the GATT offers only limited opportunity to complain successfully about trade restrictions which cannot be reduced to violations of well-established rules. This is an important reason why the GATT's dispute settlement mechanism has not been conducive to enforcing the Agreement's guiding objective of liberalizing international trade in the notorious "grey area" of trade restrictions which escape a narrow interpretation of existing GATT rules (one only has to think of

facto international organization, see R. LAUWAARS, WISSELWERKINGEN 7 (Inaugural Address, University of Amsterdam 1984).

⁴⁰ Hudec, *supra* note 36, at 480.

⁴¹ *Id.* at 489; E. MCGOVERN, *supra* note 1, at 27.

⁴² Hudec, *supra* note 36, at 502.

⁴³ See *id.* at 504.

⁴⁴ *Id.* at 482; E. MCGOVERN, *supra* note 1, at 27-28.

Voluntary Restraint Arrangements (“VRAs”)⁴⁵). The dispute settlement process itself has also been criticized by observers for being ineffective in enforcing the commitments of GATT contracting parties. Regrettably, the Tokyo Round did not yield concrete improvements in the GATT’s dispute settlement procedure.⁴⁶

b. The extension of “unreasonableness”

Increased dissatisfaction with the GATT’s enforcement mechanism prompted Congress, in the Trade Act of 1974, to include the “unreasonableness” criterion in Section 301, which enables the President to retaliate against foreign trade restrictions, even in the absence of a GATT finding that United States benefits are being nullified or impaired. The following statement taken from the Trade Act’s legislative history, explaining the inclusion of the unreasonableness criterion in Section 301, shows Congress’ bellicose mood in 1974:

(The Senate Finance) Committee felt it was necessary to make it clear that the President could act to protect U.S. economic interests whether or not such action was consistent with the articles of an outmoded international agreement (*i.e.*, the GATT—author’s note) initiated by the Executive 25 years ago and never approved by the Congress.⁴⁷

Later on, when the Trade Agreements Act of 1979 came up for Congressional approval, the legislature’s antagonism regarding the GATT had largely disappeared (Congress accepted the GATT by then as a *fait accompli*). Yet the GATT’s dispute settlement mechanisms (as elaborated in the various Tokyo Codes) still received a critical reception which prompted Congress to reaffirm and strengthen the role of Section 301 as a means to enforcing vigorously the benefits accruing to the United States under the General Agreement and its progeny, negotiated during the Tokyo Round.⁴⁸ Moreover, despite Congress’ softening attitude towards the GATT, Congress retained the unreasonableness criterion in the Trade Agreements Act of 1979 and in the Trade and Tariff Act of 1984.

⁴⁵ See *infra* text accompanying notes 192-93.

⁴⁶ The wisdom of divorcing the Code’s dispute settlement procedures from the mechanism provided in the General Agreement and of fragmenting the Code’s procedures is questionable. Besides, distinctions between the various dispute settlement procedures may be rather fluid in practice. See Hudec, *supra* note 35, at 184. The GATT’s dispute settlement machinery is still cited as its most serious weakness. Tyler, *Why GATT lacks international clout*, Financial Times (London), June 13, 1984, at 6.

⁴⁷ S. REP. NO. 1298, 93d Cong., 2d Sess. 166 (1974). For more than two decades, Congress barely tolerated the GATT, challenging the Executive’s authority to negotiate the General Agreement. See F. MEYER, INTERNATIONAL TRADE POLICY 80 (1978); Jackson, *supra* note 13, at 265-69.

⁴⁸ S. REP. NO. 249, 96th Cong., 1st Sess. 238 (1979).

Returning to an earlier observation, Section 301 continues to empower the Executive to pass independent judgment on the propriety and expedience of retaliatory action without regard to international (*i.e.*, GATT) norms and procedures. As could be expected, adoption of Section 301 initially provoked bitter criticism from United States trading partners (notably the European Economic Community) who suspected that the United States would henceforth bypass the GATT by unilaterally imposing its own conception of fairness in international trade. Provisions in the Trade Act of 1974 (as subsequently amended) allowing private complainants to trigger investigations by the United States government into foreign trade restrictions heightened the suspicions of the international trading community.

Looking back on the first ten years of Section 301's existence, however, these misgivings have not materialized. Not once did the Executive impose retaliatory restrictions following a private complaint under Section 301.⁴⁹ Moreover, probably to the dismay of the business community, the Executive has abided by the often lengthy course of GATT dispute settlement proceedings. Indeed, government-to-government negotiations are the common form of relief following an investigation pursuant to Section 301,⁵⁰ because other than the negotiations involved in dispute settlement proceedings, there has rarely been relief (*e.g.* retaliatory restrictions).

2. Other Extensions: Services and Investments

So far the noteworthy extension of the Executive's authority under Section 301 has not so much been the potential disrespect of GATT, as

⁴⁹ The President twice rested on *independent* decision to "retaliate" on Section 252 of the Trade Expansion Act of 1962, 19 U.S.C. § 252, predecessor to Section 301. The first case concerned the introduction by the EEC of a variable levy on poultry imports as part its common agricultural policy. *See generally* Lowenfeld, *'Doing unto Others . . . ' the Chicken War Ten Years After*, 4 J. MAR. L. & COM. 599 (1972/73). In 1974, the President invoked Section 252 again to "retaliate" against Canadian escape clause restrictions on United States cattle imports. *See generally* Hudec, *supra* note 36, at 535-39.

These two cases, however, were not concerned with claims of nullification or impairment within the meaning of GATT, art. XXIII (*i.e.*, "unfairness"). Both the European Community and Canada had acted in accordance with GATT procedures. In the "Chicken War," the United States sought to reestablish a balance of concessions with the European Community pursuant to GATT, art. XXVIII, para. 3(a). In the "Cattle War," the United States sought to reestablish a balance of concessions with Canada pursuant to GATT, art. XIX, para. 2(a).

In section 232 of the Trade and Tariff Act of 1984, Congress enacted legislation denying tax deductions for certain foreign advertising expenses. This provision was inspired by a Section 301 complaint about similar legislation in Canada, discouraging Canadian advertising on United States border Television stations. The border broadcasting complaint is discussed in Fisher & Steinhardt, *supra* note 28, at 643-52. *See also* text accompanying notes 393-403.

⁵⁰ Fisher & Steinhardt, *supra* note 28, at 608.

much as the applicability of Section 301 to trade in services and United States investments abroad.⁵¹ It would be beyond the scope of this article to deal with these issues in any detail⁵², yet one or two observations are relevant to our discussion.

The GATT, of course, is product-oriented. United States proposals for a new 'General Agreement on Trade in Services and Investments' have been kept at bay by a number of trading partners. The developing countries, for instance, are reluctant to tackle new issues such as services in GATT, because of the possibility that these issues would deflect attention from the outstanding problems of protectionism in the product-sector.⁵³

Several national and EEC officials have voiced their concern to this author that by pressing complaints under Section 301 against foreign service-related practices, the United States runs ahead of, if not prejudices, international consensus-building in this area. Yet one could also welcome complaints under section 301 for bringing out the issues demanding resolution in a new international agreement. Besides, even if the United States would take retaliatory action protesting foreign service-related practices, its underlying assessment of fairness certainly would not be binding on the drafters of such an agreement. If anything, the concern of these European officials reminds one of the early, and thus far largely unsubstantiated, misgivings regarding the application of Section 301 to trade in goods.

While the GATT does not pertain to investments specifically, its provisions do affect so-called investment performance requirements, to the extent they are trade-related.⁵⁴ Consider, for example, local content regulations, which prescribe to foreign investors the use of domestic factors of production regardless of their comparative advantage (e.g., availability, quality or cost).⁵⁵ Only recently, a GATT panel condemned

⁵¹ The Trade and Tariff Act of 1984 explicitly made foreign practices affecting United States investments abroad actionable under Section 301, to the extent these investments have implications for trade in goods or services. 19 U.S.C. § 2411(e)(1), *amended by* Trade and Tariff Act of 1984, § 304(f)(1), H.R. 3398, 98th Cong., 2d Sess. (1984). In addition, the 1984 Act reinforced the applicability of Section 301 to service-related complaints. *Id.*

⁵² See generally Fisher & Steinhardt, *supra* note 28, at 636-87.

⁵³ *GATT Chief Calls on U.S. Not to Abandon Multilateral System*, Financial Times (London), Nov. 27, 1984, at 6. The United States did persuade the Contracting Parties during their fortieth session in November 1984 to discuss the possibility of multilateral action on trade in services in late 1985. *GATT Members to Consider Action on Trade in Services*, Wall St. J., Nov. 30, 1984, at 2.

⁵⁴ See generally Fontheim & Gadbaw, *Trade-Related Performance Requirements under the GATT-MTN System and U.S. Law*, 14 LAW & POL'Y INT'L BUS. 129 (1982).

⁵⁵ Local content rules have also been proposed to restrict the imports of foreign products. On November 3, 1983, for example, the United States House of Representatives passed its version of the Fair Practices and Procedures in Automotive Products Act of 1983, establishing minimum domestic

certain trade-related requirements set forth by Canada's Foreign Investment Review Agency, which regulates and monitors foreign investments.⁵⁶ The GATT panel was instituted by the GATT Contracting Parties at the request of the United States government; a complaint which, incidentally, was not triggered by a Section 301 complaint.

3. Future Extension: Sectoral Reciprocity?

After the enactment of the Trade Agreements Act of 1979, Section 301 for some time became the focal point of debate in the United States on the need for "reciprocity" in international trade relations.⁵⁷ The notion of reciprocity advocated in this debate is fundamentally different from the idea of reciprocity envisaged in the General Agreement.

The GATT views reciprocity principally as the measure to gauge the equivalence of tariff concessions negotiated⁵⁸ or renegotiated⁵⁹ by its contracting parties. As such, the idea of reciprocity has been vulnerable to several criticisms: notably for being imprecise (how can tariff concessions be compared?), inadequate with respect to "low-tariff" countries (because reciprocity gives a premium to "high-tariff" countries which have more to bargain with), inappropriate with respect to developing countries (which should not be forced to pay in kind for concessions granted to them by "rich", industrialized countries⁶⁰), and cumbersome in the process of negotiating concessions (despite the difficulties in measuring reciprocity, each government will ultimately have to persuade its

content requirements applicable to all motor vehicle manufacturers who sell more than 100,000 motor vehicles in the United States each year. H.R. 1234, 98th Cong., 1st Sess. (1983). The Senate did not complete action on this bill during the 98th Congress. Accordingly, similar legislation would have to be reintroduced after the 99th Congress convenes on January 1, 1985.

⁵⁶ GATT, 30th Supp. BISD 140 (1984). An academic debate pertaining to GATT-related issues presented by the activities of Canada's Foreign Investment Review Agency preceded the panel's decision. Compare the critical appraisal in Fontheim & Gadbow, *supra* note 54, at 174-78 with the more benevolent evaluation of Carasco, *The Foreign Investment Review Agency (FIRA) and the General Agreement on Tariffs and Trade (GATT): Incompatible?*, 13 GA. J. INT'L & COMP. L. 441 (1983).

⁵⁷ See generally Gadbow, *supra* note 29.

⁵⁸ GATT, art. XXVIII, para. 1.

⁵⁹ GATT, art. XXVIII, para. 2.

⁶⁰ By adding Part IV to the General Agreement, the GATT Contracting Parties softened the application of the reciprocity principle with respect to concessions granted to developing countries. Thus, GATT, art. XXXVI, para. 8 provides that "(t)he developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to trade of less-developed contracting parties." This principle was confirmed by the GATT Contracting Parties at the end of the Tokyo Round. See Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (Decision of Nov. 28, 1979), GATT, 26th Supp. BISD 203, 204, para. 5 (1980). The GATT Ministerial Declaration of November 1982 urged the Contracting Parties "to implement more effectively" Part IV and the 1979 Decision on differential and more favorable treatment of developing countries. *Supra* note 37, at 13.

constituents that it did receive reciprocal, *i.e.*, the most advantageous, concessions at the bargaining table without "giving away" too much).⁶¹

Nevertheless, this idea of reciprocity also limits the extent to which contracting parties may retaliate against one another in those cases where the GATT membership decides that benefits accruing under the General Agreement have been nullified or impaired.⁶² Article XXIII only allows "compensatory" increases in trade barriers; retaliation should not have a "punitive" character.⁶³ Again, the GATT seeks to maintain an equilibrium of concessions among its contracting parties.

In contrast, proposals for "reciprocity" legislation which have emerged in the United States focus on the equivalence of remaining import restrictions and their trade impact.⁶⁴ Various notions of reciprocity have been advanced by Congressmen at the instigation of pressure groups. Bills were designed to achieve reciprocity (*i.e.*, "substantially equivalent competitive opportunities") in specific products or sectors.⁶⁵ Observers rightly pointed out, however, that product-by-product or sectoral reciprocity runs counter to basic GATT principles, if only because under certain circumstances countries have a right to protect industries against import competition.⁶⁶ For this reason alone, no exporter can lay claim to market access in a foreign country equivalent to that accorded to United States products in the exporter's home market.

With respect to Section 301, caution seems to have prevailed in the Trade and Tariff Act of 1984. As an alternative to the notion of "substantially equivalent competitive opportunities", Congress finally introduced the standard of "fair and equitable market opportunity" in Section

⁶¹ J. JACKSON, *supra* note 1, at 241-43. Some even argue that floating exchange rates have largely obviated the economic rationale for reciprocity because governments can let floating exchange rates equilibrate payment and trade flows. They view linkage of import liberalization with assurances of additional export opportunities mainly as a means to generate domestic support for trade concessions and to hold off protectionist pressures. Petersmann, *supra* note 13, at 428-29.

⁶² See K. DAM, *THE GATT, LAW AND ECONOMIC ORGANIZATION* 352 (1970); J. JACKSON, *supra* note 1, at 170.

⁶³ Hudec, *supra* note 36, at 468.

⁶⁴ Gadbaw, *supra* note 29, at 694.

⁶⁵ See, e.g., the initial draft of the Wine Equity Act, set forth in H.R. 3795, 98th Cong., 1st Sess. (1983). One of the purposes of this Act was "to achieve access to foreign markets for United States wine *substantially equivalent* to the market access afforded to foreign wine by the United States." *Id.* at § 2(b)(2). As finally adopted in the Trade and Tariff Act of 1984, the purpose of the Wine Equity Act was toned down "to achieve greater access to foreign markets for United States wine and grape products through the reduction or elimination of tariff barriers and non-tariff barriers to (or other distortions of) trade in wine." Trade and Tariff Act of 1984, § 903(b)(3).

⁶⁶ Gadbaw, *supra* note 29, at 735. Consider GATT, art. XIX (escape clause) which makes provisions for temporary relief (*i.e.*, safeguard measures taking the form of import restrictions) in case a domestic industry is injured by an unforeseeable increase in imports.

301.⁶⁷ Thus a sector-by-sector comparison of market access in foreign countries compared to the United States could be avoided. It should be noted, that the Reagan Administration thus far has strongly opposed a sector-by-sector comparison.⁶⁸ Even so, country-by-country appraisals of "fair and equitable market opportunities" create the risk of fragmenting the multilateral trading framework into bilateral ententes. Thus these appraisals can undermine the GATT's basic principle of unconditional Most-Favored-Nation ("MFN") treatment. They tie in, however, with a more general trend in GATT towards deviations from the unconditional MFN principle.⁶⁹

Passage of the Trade and Tariff Act of 1984 indicates that pressures to import sectoral reciprocity standards in Section 301 have abated. Abatement does not mean that the idea of sectoral reciprocity has disappeared from the legislature's agenda. Rather than using Section 301 as a balancing mechanism and depending on Executive decision-making, Congress may take matters into its own hands. It may seize upon particular sectors and pass legislation to secure reciprocity in these areas.

A conspicuous initiative in this respect was the Telecommunications Trade Act of 1984, which Senator Danforth proposed. Senator Danforth's bill was designed to open up foreign markets to United States telecommunications products.⁷⁰ It effectively required the President to withdraw United States tariff concessions on imported telecommunications products, if within three years after the enactment of the bill the President had been unable to reach agreement with United States trading partners on reduction of their import barriers to United States telecommunications products.⁷¹ Congress presumably would have had power of

⁶⁷ Congress cited denial of "fair and equitable market opportunities" to United States industries as an example of "unreasonableness" in the Trade and Tariff Act of 1984. *Supra* text accompanying note 31. The senate, which originally proposed the "fair and equitable" language, refrained from giving a further definition, "since it remains within the President's discretion to determine when circumstances exist which require action under this provision." S. REP. NO. 308, 98th Cong., 1st Sess. 46 (1983).

Note that the achievement of "substantially equivalent competitive opportunities" in foreign markets still is one of the purposes of the title in the 1984 Act dealing with the liberalization of international trade. *Id.*, section 302(1). Consequently, this reciprocity notion, instead of being the standard for retaliatory action, has become one of the negotiating objectives for the Executive.

⁶⁸ See Gadbow, *supra* note 29, at 740.

⁶⁹ Consider, for example, the reciprocity notions introduced in various Tokyo Codes. See *infra* notes 207 (reflecting on the Subsidies Code) and 236 (reflecting on the Standards Code).

⁷⁰ S. 2618, 98th Cong., 2d Sess. (1984). A stated objective of the bill was to "provide competitive opportunities for United States exports of telecommunications products . . . which are substantially equivalent to the competitive opportunities provided by the United States. . . ." *Id.* at § 181(a)(1). Since this bill was not enacted during the 98th Congress, it will have to be reintroduced when the 99th Congress convenes.

⁷¹ *Id.* at section 183(b). The withdrawal of United States tariff concessions on telecommunica-

approval over any such agreement.⁷²

Through such legislative techniques, Congress can severely restrict Executive discretion in the trade policy area. This ability of Congress may stimulate the Executive to act more aggressively pursuant to Section 301, in order to steer clear of Congressional interventions.

4. Summary

While in theory the Executive is empowered to disregard GATT norms and procedures in deciding on retaliation against foreign trade restrictions, the first decade of experience with Section 301 shows that, in fact, the Executive respects the outcome of GATT's dispute settlement processes. One could even argue that the United States has restored a certain measure of confidence in the GATT's dispute settlement mechanisms by funnelling a number of sensitive issues through Article XXIII, rather than taking unilateral action. It remains to be seen, though, whether the forces currently at work in the reciprocity debate will affect the heretofore prudent posture of the United States government. This aside, it is noteworthy that Section 301 admits complaints about barriers interfering with United States trade in goods (e.g., GATT-oriented complaints) as well as trade in services and United States foreign investments.

Against this background, the position of a private complainant under Section 301 can be put into better perspective. With a broad understanding of the foreign practices Section 301 was designed to redress, it is now apposite to turn to the procedural aspects of Section 301.

B. Origin and Development of a Private Complaint Procedure

The private remedy created by Section 301 originates from the Trade Expansion Act of 1962. On Congressional initiative, this Act for the first time instructed the Executive to hold public hearings, at the request of private parties, regarding foreign import restrictions. Significantly, however, no such hearings were ever held. Again under Congressional pressure, Section 301 of the Trade Act of 1974 introduced the skeleton of a private complaint procedure. Yet the business commu-

tions imports, for most products, would increase the rate from an average of 5 per cent ad valorem to 35 per cent ad valorem (and up to 65 and 85 per cent ad valorem for certain optical fiber products). *Id.* at section 202(a). Given the volume of affected trade, estimated to amount to several billion dollars, the ramifications of such a withdrawal would be tremendous. Consider, for example, compensatory demands or withdrawals of concessions by affected GATT Contracting Parties pursuant to art. XXVIII (concerning tariff negotiations). The reciprocity notion of the bill, resulting in bilateral negotiations, would further erode the GATT's unconditional most favored nation (hereinafter referred to as "MFN") principle (*i.e.*, art. I).

⁷² See Trade Act of 1974, §§ 102 and 151.

nity gave the administration of this procedure by the Executive mixed reviews; as a result, so too did Congress. Only the Trade Agreements Act of 1979, in amending Section 301, established a full-fledged private complaint procedure. The Trade and Tariff Act of 1984, finally, reaffirmed the role of private petitioners, without altering their procedural position.

1. The Trade Expansion Act of 1962

The draft of the Trade Expansion Act, which the Kennedy Administration submitted to Congress, contained no proviso regulating citizens' complaints of unfair trade practices. Once again, however, Congress gave broad authority to the President to suspend United States benefits in response to acts by foreign countries which would "defeat the purposes" of the Act.⁷³ Interestingly enough, the Kennedy Administration appeared more concerned about tariffs than about non-tariff barriers ("NTBs"), which now, however, constitute the bulk of complaints filed under Section 301.⁷⁴

During the course of Congressional hearings, the House Committee on Ways and Means became increasingly apprehensive about NTBs. Thomas B. Curtis, a Republican representative from Missouri, in particular, made a number of pertinent inquiries regarding non-tariff trade restrictions. At that time, the Kennedy Administration had just negotiated the Short Term Arrangement for Cotton Textiles, obliging mostly developing countries (and some developed countries such as Japan) to limit their surging exports in order to protect the textile industries in importing countries such as the United States.⁷⁵ Mr. Curtis inquired how the United States textile industry obtained this relief, while many other industries also pleading special circumstances received no such protection. He further asked whether those who disagreed with the negotiation of the Cotton Textiles Agreement had had an adequate opportunity to present their case:

At least I am talking of a government by laws, not by men. Who determined these things and how were the procedures followed where the textile industry even got a day in court, if we can call this a court?

⁷³ See section 242 of the Kennedy Administration's proposals, the text of which is reprinted in *Trade Expansion Act of 1962: Hearings on H.R. 9900 Before the House Committee on Ways and Means*, 87th Cong., 2d Sess. 16 (1962) (hereinafter cited as "1962 House Hearings").

⁷⁴ "(L)et us not miss the point. The major barrier to trade expansion . . . is not the complex of nontariff restrictions. Rather it is, and increasingly will be, the tariffs." Remarks by Secretary of Commerce Luther H. Hodgson, *id.* at 3777. See also the Presidential report reprinted in *id.* at 3856.

⁷⁵ This arrangement preceded the various Multifibre Arrangements. See generally van Dartel, *The Conduct of the EEC's Textile Trade Policy and the Application of Article 115 EEC*, in *PROTECTIONISM AND THE EUROPEAN COMMUNITY* 99, 100-07 (Völker ed. 1983).

. . . .
How does anyone get this (special kind of protection—author's note)? Now the accusations have been made that it is political pressure. I don't shirk away from such an expression because I think political pressure can be very proper and healthy. But I think it is very important that we set up proper channels for the exertion of political pressure. That is what the Congress is about, among other things. We receive and through our procedures absorb, political pressures and translate them into action. The reason I think the Constitution wisely vested the power over foreign trade in this body is because of the procedural aspects.⁷⁶

Mr. Curtis then moved to the subject of NTBs which, rather than tariffs, seemed to him to be the major issue in complaints about unfair governmental trade practices. He opined that the Executive's handling of NTBs so far resembled "a sort of catch-as-catch-can operation".⁷⁷ The Congressman next outlined some of his ideas for improvement:

Mainly I would like to see the setup in the traditional American way of doing things of witnesses confronting each other, so that it is not this business in camera, one side stating its case and then another side stating it, but like we do here in this committee or any congressional committee.⁷⁸

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I would like to see in this act a few definitions of what we regard, at any rate, (as being) fair trade . . . (I)t might be well for us to spell them out so that we know the direction toward which we are trying to go, and indeed the private sector can understand what our standards are.⁷⁹

In the bill which the House Ways and Means Committee reported and which incorporated its draft of the Trade Expansion Act of 1962, the Committee inserted a provision which required the Executive to hold public hearings on foreign unfair trade practices at the request of "any interested person".⁸⁰ The bill also required that the Executive promulgate regulations concerning the conduct of such hearings, for the administration of which a newly established "interagency trade organization" was responsible.⁸¹

Mr. Curtis reiterated his position that adequate procedures could contribute to the enforcement of international trade agreements in subsequent hearings before the Senate Finance Committee:

At present there is no established body before which American business and labor can present allegations of unfair trade practices which are in violation of international commercial agreements. This bill establishes such procedures. The Interagency Trade Organization is created as a forum where

⁷⁶ 1962 House Hearings, *supra* note 73, at 3855.

⁷⁷ *Id.* at 3857.

⁷⁸ *Id.* at 3858.

⁷⁹ *Id.* at 3863.

⁸⁰ H.R. 11970, 87th Cong., 2d Sess. § 252(c) (1962).

⁸¹ *Id.*

interested persons can establish the truth of alleged unfair foreign trade restrictions in violation of trade agreements. If the Executive carries out the intent of the Congress, when a violation of a trade agreement is established he may withdraw concessions. This can become an important part of our foreign trade policies and practices. It should be pointed out that the Interagency Trade Organization is not set up to hear only the complaints of our domestic industry and labor. It will be available as well for our importers to register complaints of alleged unfair practices by our domestic industry against foreign imports.⁸² *The importance of this device should not be played down. It can be an effective force in the effort to establish the type of fair trade practices in international commerce which are essential to the stimulation of increased foreign trade.*⁸³ (emphasis supplied)

The Trade Expansion Act of 1962, as it was finally enacted, did retain the provision regarding public hearings which the House Ways and Means Committee proposed.⁸⁴ Congress charged the Trade Policy Committee, as the interagency trade organization was subsequently called, with the more encompassing task of providing overall trade policy guidance to the President.⁸⁵ Another newly created organization, the Special Trade Representative ("STR"), chaired the committee. The STR became the President's chief negotiator of international trade agreements (replacing the State Department) and further consisted of the Secretaries of State, Treasury, Commerce, Agriculture, Labor, Interior and Defense.⁸⁶ This organizational format represented the nucleus of what was to become the administration of Section 301.

In theory at least, Representative Curtis' views had prevailed.

2. The Trade Act of 1974

Efforts to pass a new trade act in 1970, which stemmed in part from a desire to renew the Executive's authority to negotiate trade agreements, failed because of opposition in the Senate⁸⁷. After the 1972 presidential elections, the Nixon Administration started work on what was called the Trade Reform Act of 1973. The Administration's proposals for a new Section 301 included several changes in the President's authority to retaliate against foreign unfair trade actions, but the Administration adopted

⁸² This suggestion, worthy though it might be, proved to be a pipe-dream.

⁸³ *Trade Expansion Act: Hearings on H.R. 11970 Before the Senate Committee on Finance*, 87th Cong., 2d Sess. 1451 (1962) [hereinafter cited as *1962 Senate Hearings*].

⁸⁴ See Trade Expansion Act of 1962 § 252(d), reprinted in J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 833 (1977).

⁸⁵ Graham, *The Reorganization of Trade Policymaking: Prospects and Problems*, 13 CORNELL INT'L L.J. 221, 224 (1980).

⁸⁶ *Id.*

⁸⁷ See generally J. JACKSON, *supra* note 84, at 154-62 (discussing the legislative background of the Trade Act of 1974).

verbatim from the Trade Expansion Act of 1962 the clause providing for private involvement through public hearings.⁸⁸

This provision, however, had never lead to public hearings, nor to any visible action by the Executive.⁸⁹ The off-handed way in which the Nixon Administration reverted to an inoperative clause roused the business community. A large residue of distrust with Executive discretion manifested itself in proposed amendments to ensure that notice and public hearings be mandatory prior to any Executive action under Section 301.⁹⁰ Congress took this private discontent to heart, as the following passage taken from a Senate Finance Committee report shows:

In order to make section 301 a more effective tool against foreign practices and policies adversely affecting the U.S. economy, the Committee also provided a complaint procedure whereby interested parties could petition the Special Representative for Trade Negotiations to conduct a review, with public hearings of such alleged practices and policies. The Special Representative would be required to report to Congress on a semi-annual basis concerning the status of the reviews undertaken pursuant to this section.⁹¹

The Senate did object, however, to proposals from the House, which provided for Congressional authority to override every action taken by the President pursuant to Section 301. In the Senate's view, Congress should have the authority to veto Presidential measures only in those cases where the President decided to retaliate across-the-board (*i.e.*, against countries other than those whose restrictions were the cause of retaliation). The House agreed with this view in the end.⁹² The provisions of Section 301 relating to private complaints, as finally adopted in the Trade Act of 1974 during the Ford Administration, set forth an elementary procedure along the lines which the Senate Finance Committee suggested.

In the years between the enactment of the Trade Act of 1974 and the entry into force of the Trade Agreements Act of 1979 on January 1,

⁸⁸ HOUSE COMM. ON WAYS AND MEANS, 93d Cong., 1st Sess., PREPARED STATEMENT OF ADMINISTRATION WITNESS AT PUBLIC HEARINGS BEGINNING ON MAY 9, 1973, RELATING TO THE ADMINISTRATION PROPOSAL ENTITLED THE "TRADE REFORM ACT OF 1973" (H.R. 6767) 155-57 (1973) (testimony of Special Trade Representative William D. Eberle).

⁸⁹ Interviews with Thomas B. Curtis (May 24-25, 1980). Only in the first few years after the enactment of the Trade Expansion Act of 1962 did the President issue annual reports, but no Congressional committee instituted hearings to follow up on these reports according to Mr. Curtis.

⁹⁰ See generally STAFF OF HOUSE COMM. ON WAYS AND MEANS, 93D CONG., 1ST SESS., LISTING OF AMENDMENTS PROPOSED TO H.R. 6767, THE PROPOSED TRADE REFORM ACT OF 1973 18-19 (Comm. Print 1973).

⁹¹ S. REP. NO. 1298, 93d Cong., 2d Sess. 31 (1974).

⁹² See CONF. REP. NO. 1644, 93d Cong., 2d Sess. (1974).

1980, twenty-one complaints were filed under Section 301.⁹³ Approximately fifty percent of these complaints concerned agricultural products (such as eggs, citrus, wheat and canned fruit), the remainder being almost equally divided between intermediate or end products (notably home appliances, steel, tobacco and leather) and services (four cases involving insurance, the other one involving advertising). Import restrictions, discriminatory practices, and foreign subsidies displacing United States exports in third world countries raised objections from United States complainants. The European Community (in particular its Common Agricultural Policy) and Japan were most often the object of the complaints. The seven other complaints stemmed from practices of Canada, Argentina, Guatemala, Korea, Taiwan and the Soviet Union. As of September 1984, most cases were resolved, though several early petitions are still pending.⁹⁴ In at least two instances, however, the President formally determined that a foreign practice was unfair according to Section 301, without deciding to retaliate.⁹⁵

The Executive decision-making progress under Section 301 during the first years of its existence did not follow a clear pattern. The brief bi-annual reports to Congress hardly explained the differences in timing (or, in delays) and in approach (bi-lateral discussions as opposed to formal dispute settlement proceedings). One administrative agency, in carrying out an evaluation, said rather critically:

The STR proceeding, if it can be called that, is hardly a remedy in any traditional sense. The STR is only required to "conduct a review" (the statutory phrase) of the complaint and report summaries of proceedings every 6 months. Remarkably few complaints have been filed under Section 301, considering the number of complaints exporters expressed to the Commission while it studied nontariff barriers in 1974. Still, the Commission

⁹³ Based on a table of cases, dated Sept. 6, 1984, prepared by the office of the United States Trade Representative for its public reading file.

⁹⁴ *E.g.*, the complaint filed in 1975 by Great Plains Wheat, Inc. alleging that EEC restitutions on wheat exports displace United States wheat exports to Brazil. *See generally* Echols, *Section 301: Access to Foreign Markets from an Agricultural Perspective*, 6 INT'L TRADE L.J. 4, 14-15 (1980/91). At the time of this writing, a 1983 panel decision is still under consideration by the signatories to the Subsidies Code.

⁹⁵ In his first affirmative decision, following a complaint brought by the American Institute of Marine Underwriters, the President determined that the U.S.S.R. unreasonably required that marine insurance on all trade between the United States and the U.S.S.R. be placed with a Soviet state insurance monopoly. 43 Fed. Reg. 25,212 (1978). The President took another affirmative decision in the border broadcasting case brought by United States broadcaster against Canada. 49 Fed. Reg. 51,173 (1980). Again, he did not impose retaliatory restrictions himself, but in this case proposed that Congress enact legislation similar to the Canadian law which was the object of the complaint. Congress finally passed this "mirror-legislation" in the Trade and Tariff Act of 1984. *See supra* note 49.

concluded that "the process has worked to some extent."⁹⁶

Private industry reacted less benevolently. Already in 1976, one industry-spokesman reminded Congress that subjecting Executive action to specific time limits rendered Section 301 virtually meaningless.⁹⁷

3. The Trade Agreements Act of 1979

During the 1979 hearings on legislation implementing the various agreements negotiated in the Tokyo Round, most witnesses stressed the need for time limits in Section 301 proceedings. Other suggestions included a more active role for United States government agencies by requiring them to report violations of trade agreements to the private sector.⁹⁸ More than ever, industry and labor insisted on the necessity of adequate procedures: "If the procedures do not result in swift action, a great many Americans will learn that a right delayed is no right at all."⁹⁹

Both Congress and the Carter Administration proved amenable to change. Although other political actors contributed to change, the Senate was mainly responsible for tightening Section 301. The Senate felt that if the Tokyo Codes were to survive their negotiation, the business community's role in enforcing these agreements ought to be fortified.¹⁰⁰ While Congress newly incorporated several procedural guarantees into the Trade Agreements Act of 1979, perhaps its most important change was the introduction of specific time limits.

a. Time limits

Congress imposed time constraints on each phase of the 301 proceedings. Disposition of a complaint about alleged export subsidization by a foreign signatory to the Subsidies Code, which might have the effect of diverting United States exports from foreign country markets or of reducing domestic sales of a petitioner, may illustrate the timetable imposed by Congress on the Executive:

⁹⁶ U.S. INT'L TRADE COMM., 96TH CONG., 1ST SESS., MTN STUDIES NO. 6, PART 1 50-51 (Comm. Print 1979).

⁹⁷ *Oversight Hearings on U.S. Foreign Trade Policy Before the Senate Finance Committee*, 94th Cong., 2d Sess. 321 (1976).

⁹⁸ See generally SUBCOMM. ON TRADE OF THE HOUSE COMM. ON WAYS AND MEANS, 96TH CONG., 1ST SESS., COMPARISON OF RECOMMENDATIONS RECEIVED FROM PUBLIC WITNESSES ON MULTILATERAL NEGOTIATIONS' IMPLEMENTING LEGISLATION 118 (Comm. Print 1979).

⁹⁹ *The Trade Agreements Act of 1979, Hearings on S. 1376 Before the Subcommittee on International Trade of the Senate Finance Committee*, 96th Cong., 1st Sess. 127 (1979) (statement by Ray Denison, Associate Director, Department of Legislation, A.F.L.-C.I.O.).

¹⁰⁰ See S. REP. NO. 249, 96th Cong., 1st Sess. 232-44 (1979).

- Day 1: Petitioner files with the Office of the United States Trade Representative ("USTR"). An official at USTR chairs the so-called Section 301 Committee, consisting of representatives of various departments (notably State, Commerce, Agriculture, Labor, Justice, Treasury, Interior, Transportation, Defense and Energy) and agencies (notably the Council of Economic Advisers, Office of Management and Budget, the National Security Council and the International Trade Commission).¹⁰¹ Some departments and agencies are permanently represented on the Section 301 Committee, others only in cases which are of particular concern to them. In this way, the Section 301 process also gives weight to views and interests which are unrelated to trade. Different hierarchical levels exist in the decision-making process of the Section 301 Committee. Complaints are first investigated at the staff level by the Trade Policy Staff Committee. If no consensus can be reached here, or if sensitive issues (or important trading partners) are involved, the matter will be dealt with at the Assistant Secretary Level (in the Trade Policy Review Group) or at Cabinet Level (in the Trade Policy Committee, the progeny of the "interagency trade organization" established by the Trade Expansion Act of 1962).¹⁰² The Section 301 Committee is run on a majority-vote basis, which may on occasion give non-trade related interests a decisive vote.¹⁰³
- 1-45 days: USTR determines whether to initiate an investigation; if affirmative
- 45-75 days: USTR shall organize a public hearing at the request of complainant (this period may be extended if agreed to or requested by complainant).
- 45-260 days:
(7 months) USTR shall request consultations with the foreign government concerned (this request may be delayed for up to 90 days¹⁰⁴);

¹⁰¹ 3 C.F.R. § 181 (1984).

¹⁰² See *supra* text accompanying note 85.

¹⁰³ Fisher & Steinhardt, *supra* note 28, at 652 (who criticize the "inordinate influence of no-trade-related sections of the government made possible by this voting system).

¹⁰⁴ 19 U.S.C. § 2413(b)(1), *amended by* Trade and Tariff Act of 1984, § 304(e). If such consultations are delayed, each time limitation shall be extended for the period of such delay. *Id.*

USTR shall, if consultations are not satisfactory, invoke the formal dispute settlement proceedings provided for in article 13 of the Subsidies Code, and shall on the basis of these proceedings make a recommendation to the President as to what action, if any, he should take under Section 301. There is no provision extending this time limit if the international dispute settlement procedure has not been concluded (this statutory time limit is particular to complaints under the Subsidies Code). Before making his recommendation, the USTR shall at the request of any interested person (including, *e.g.*, importers and consumer organizations affected by possible retaliation) organize hearings and obtain advice from the appropriate private sector.

This time limit varies for different categories of complaints.

Non-export-subsidy issues covered by the Subsidies Code should be resolved within eight months after USTR has initiated an investigation.

With respect to complaints involving other Tokyo Codes and the GATT itself, USTR is to issue his recommendation to the Executive within thirty days after the dispute settlement procedure of the Code concerned has been completed. Because these procedures are not subject to strict time limits, one cannot predict when the USTR will in fact present his conclusions to the President.

In all other cases USTR is required to submit his recommendation within twelve months after an investigation has been initiated.

260-281
days:

The President decides on what action, if any, he will take. Not infrequently, the President favours continued consultations with the foreign government concerned, consultations which are then free of time constraints.

The time limits imposed on the Executive in different Section 301 actions may be conveniently arranged in a table.

Table 1

total time	45 DAYS (admission) + 7 MONTHS ¹ (USTR investigation) -international consultations and/or -dispute settlement proceedings -recommendation to President + 21 DAYS (President's decision)	45 DAYS + 8 MONTHS ¹	45 DAYS + 12 MONTHS ¹	45 DAYS + ? MONTHS + 30 DAYS + 21 DAYS
complaint of				
export subsidies granted by signatories to the Subsidies Code	X ²			
other subsidies granted by signatories to the Subsidies Code		X		
subsidies granted by GATT contracting parties which are not signatories to the Subsidies Code (as an example of complaints of violation or non- violation nullification or impairment under the General Agreement)				X
subsidies granted by countries which are not party to GATT, or practices not covered by GATT or other trade agreements (examples of complaints of "unreasonable" practices)			X	
practices covered by Tokyo Codes other than the Subsidies Code				X

¹ Subject to the possibility of a 90-day extension (Trade and Tariff Act of 1984)

² In case a 301 petition involves complaints both of export as well as other subsidies USTR assumes that the 8-month time limit applies to disposition of this petition.¹⁰⁵

¹⁰⁵ Interview with Jeanne S. Archibald, Chairman of the Section 301 Committee and Associate General Counsel, Office of the United States Trade Representative (Nov. 1, 1984).

This table suggests that one cannot predict at what point in time the USTR will present its recommendations to the President, in the event the petition involves the GATT itself, or Tokyo agreements other than the Subsidies Code.

As a preliminary remark, the Trade Agreements Act of 1979 is ambiguous as to whether disposition of complaints involving the General Agreement is subject to the time limit reserved for non-Subsidy Codes or to the 12+ months period. According to the text of the statute, it seems that GATT complaints are covered by the 12+ months period.¹⁰⁶ The USTR, however, took the view that the time-limit pertaining to non-Subsidy Codes comprises GATT-complaints.¹⁰⁷ Congress ultimately accepted this interpretation.¹⁰⁸

Because the time constraints which Congress imposed on Section 301 proceedings are of such importance, another table below indicates the time limits (if any) pertaining to dispute settlement pursuant to the Codes. Generally speaking, in the event a complaint is raised under one of the Codes, dispute settlement takes the following course. First, the applicant signatory must engage in consultations with the respondent country. Second, if these consultations do not resolve the dispute, any party to the dispute may request the Code's supervisory Committee (which represents the signatories) to help facilitate a solution. These conciliation efforts always precede a panel investigation. The Standards Code and the Customs Valuation Code provide for another intermediary step at which time either party can request technical review of the issues by an expert body.

Only if these conciliation efforts fail can either party request a panel investigation, to which it is entitled under the Codes (except for the Import Licensing Code which follows general GATT practice). The supervisory Committee shall take "appropriate" action with respect to panel reports, including recommendations to the respondent country to eliminate the disputed practice. Significantly, if the (respondent) party finds itself unable to implement the Committee's recommendations, several Codes instruct the Committee to consider what "further action" may be

¹⁰⁶ See 19 U.S.C. § 2414(a)(1)(C) and (D) (1982). Item C only refers to trade agreements approved pursuant to the Trade Agreements Act of 1979.

¹⁰⁷ Archibald, *Section 301 of the Trade Act of 1974*, MANUAL FOR THE PRACTICE OF INTERNATIONAL TRADE LAW VII-9 (Federal Bar Association 1984). Apparently the argument was that since the 1979 Act adopted the Tokyo Understanding on GATT dispute settlement proceedings (*supra* note 37), complaints involving the General Agreement should also be covered by the time limit regarding the non-Subsidy Tokyo Codes.

¹⁰⁸ See H.R. REP. NO. 383, 98th Cong., 1st Sess. 13 (1983).

appropriate.¹⁰⁹ None of these Codes subjects the further actions to a time limit.

It appears that the USTR generally is not under any time constraint to submit a recommendation to the President in case the complaint involves non-Subsidy Codes, because the non-Subsidy Codes do not fix a particular period within which the dispute settlement procedure is deemed to have been concluded. The same holds true for complaints involving the General Agreement since the dispute settlement process of Article XXIII of the GATT is not subject to effective time limits either (In table 2, look at the process of dispute settlement under the Import Licensing Code, which follows customary dispute resolution under Article XXIII).

In conclusion, the time limits which Congress imposed on the USTR in connection with GATT-related complaints vary. Few operate independently from the progress of international proceedings; most do not. The Section 301 time limits which are dependent on the outcome of international proceedings do not appear to constrain the actions of the USTR.

b. Other procedural guarantees

In addition to the introduction of time limits, the 1979 amendments required both the USTR and the President to publish reasoned determinations in the Federal Register (the United States Government's "official gazette").¹¹⁰ Because this requirement includes Executive decisions not to pursue a private complaint, the business community should gain a better understanding of the operation and interpretation of international trade rules. Furthermore, the USTR must actively assist petitioners in their efforts to substantiate complaints about foreign government activities which they claim to be unfair.¹¹¹ In this way, the USTR actually may avoid trade conflicts by helping complainants to correctly interpret foreign regulations and international rules. At the same time, this requirement offsets to a certain extent possible Executive inclinations to avoid investigating inconvenient complaints (e.g., complaints carrying little political clout domestically, or complaints raising foreign policy concerns internationally). Congress further counteracted such Executive hesitations by requiring the USTR to start international consultations

¹⁰⁹ See Standards Code, art. 14.20; Government Procurement Code, art. VII.12; Customs Valuation Code, art. 20.8.

¹¹⁰ 19 U.S.C. § 2412(b) (1982).

¹¹¹ 19 U.S.C. § 2415, amended by Trade and Tariff Act of 1984, § 304(g). USTR does not permit use of this provision for "fishing expeditions." Archibald, *supra* note 107, at VII-5.

Table 2

time limits complaint under	Consultations	Conciliation		Technical Review		Panel Investigation		Enforcement		Total Time Prescribed
		Committee meeting	Committee investigation	establishment technical body	proceedings	establishment	proceedings	Committee recommendation	further Committee action	
Standards Code	—	within 30 days upon request (art.14.4)	within 3 months (art.14.14)	— Note: technical review follows conciliation	normally within 6 months (art.14.11)	normally within 14 days (Annex 3)	normally within 4 months (art.14.18)	normally within 30 days (art.14.19)	—	— exception for certain crops: 12 months effort (art.14.7)
Government Procurement Code	—	within 30 days upon request (art.VII.6)	within 3 months (art.VII.7)	not applicable		normally within 14 days (art.VII.8)	normally within 4 months (art.VII.10)	normally within 30 days (art.VIII.11)	—	—
Customs Valuation Code	—	within 30 days upon request (art.20.1)	within 3 months or within 1 month (after prior technical review) (art.20.5)	0 days (standing committee) Note: technical review part of conciliation	normally within 3 months (art.20.4)	normally within 14 days (art.2 of Annex III)	normally within 4 months (art.6 of Annex III)	normally within 30 days (art.20.7)	—	—
Antidumping Code	—	within 30 days upon request (art.15.4)	within 3 months (art.15.5)	not applicable		normally within 30 days (arts.11 and 12 Understanding on Art. XXIII)	-in urgent cases within 3 months (art.20 Understanding) - in other cases within 3-9 months (art. 6(ix) of Annex to Understanding)	within a "reasonable period of time" (art.21 Understanding)		—
Import Licensing Code (follows Article XXIII Understanding throughout)	—	—	—							
Subsidies Code export subsidies	within 30 days (art.13.1)		within 30 days or more rapidly in urgent situations (art.17.3)	not applicable		within 30 days (art.18.2)	within 60 days (art.18.2)	within 30 days (art.18.9)	—	Note: this Code generally contains strict time limits without allowing for extensions
Other Subsidies	within 60 days (art.13.2)	"immediately" (art.17.3)								

with the foreign government concerned, once it decides to initiate an investigation.¹¹²

While limiting Executive discretion under Section 301 in various ways, Congress refrained from subjugating Executive determinations to legislative or judicial review. The Trade Agreements Act of 1979 deleted the provision in the Trade Act of 1974 which subjected certain Presidential actions under Section 301 to Congressional veto.¹¹³ Even if Congress had retained authority to overturn Executive determinations pursuant to Section 301, it is doubtful whether nowadays this legislative veto would be held constitutional in view of a recent Supreme Court decision.¹¹⁴ Moreover, the Trade Agreements Act did not explicitly provide for judicial review of any Executive determination under Section 301. This lack of provision has certainly diminished the prospects for a judicial examination of Executive action or inaction.¹¹⁵

c. Summary of case law

From January 1, 1980 through August 31, 1984, twenty-six cases were filed under Section 301.¹¹⁶ Accordingly, the reinforcement of the procedural position of private petitioners in the 1979 Act did not result in an avalanche of 301 complaints, as some foreign observers had expected. During this period, the majority of complaints concerned manufactured products (such as steel, footwear, machinery), though agricultural products still figured prominently (soybean oil, sugar, rice, etc.). Three service-related complaints were submitted (involving courier services, film distribution and satellite launchings). The bulk of the petitions objected to foreign subsidies, which petitioners claimed either displaced United States exports or affected their home market position. Other complaints notably involved restrictions on United States exports. One recent complaint for the first time relied on the Standards Code.

Again, the Section 301 proceedings incriminated the European Eco-

¹¹² 19 U.S.C. § 2413 (1982). See *infra* text accompanying note 119.

¹¹³ See Trade Act of 1974, § 302.

¹¹⁴ *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983). Of course, Congress could have made provision for a "joint resolution" in the event it wanted to override the President's determination (not) to take action. In section 248 of the Trade and Tariff Act of 1984, Congress did indeed substitute the "joint resolution" for the "legislative veto" to express its disapproval of Executive action under the escape clause, in order to remedy the possible unconstitutionality of the latter.

¹¹⁵ Fisher & Steinhardt, *supra* note 28, at 578, argue that the President's decision not to take retaliatory action is not subject to judicial review. The question remains whether the decision of the USTR to initiate investigation under Section 301 or to terminate an investigation is judicially reviewable.

¹¹⁶ Based on a table of cases, dated Sept. 6, 1984, prepared by the Office of the United States Trade Representative for the public reading file.

nomic Community most frequently; in eleven cases, complainants targeted the entire EEC or individual Member States. Argentina, Brazil, Canada, Korea and Taiwan each were the object of at least two investigations. Austria, Japan, Portugal, Spain and Sweden took responsibility for one complaint each. As of September 1984, fourteen cases were still pending. The remaining twelve complaints were resolved, withdrawn, or terminated in their investigation by the Executive for lack of merit.¹¹⁷ In none of these cases did the President formally determine that a foreign practice was unfair and propose retaliatory action pursuant to Section 301.¹¹⁸

4. The Trade and Tariff Act of 1984

The procedural position of private petitioners under Section 301 remained virtually unchanged in the Trade and Tariff Act of 1984. The Act did not introduce judicial review of any Executive decision in Section 301 proceedings. In fact, Congress allowed the USTR more freedom in disposing of private complaints. As mentioned earlier, the USTR can now delay a request for consultations with the foreign government implicated in a Section 301 complaint for up to 90 days after it has decided to initiate an investigation.¹¹⁹ Moreover, House proposals to shorten the time limits imposed on the USTR, in making recommendations to the President on what action he should take under Section 301, failed to pass. With respect to GATT (including Code-related) complaints, these proposals would have severed any link between the progress of international proceedings and the time at which the USTR was supposed to submit its recommendation to the President. In all cases involving trade agreements, the USTR would have had to draw conclusions within eight months after the initiation of a case. Quite remarkably, the USTR would have had to depend on the consent of the petitioner for an extension of this time limit.¹²⁰

¹¹⁷ In one case the President formally determined that the targeted country (Taiwan) did not unfairly restrict United States exports (of footwear). 48 Fed. Reg. 56,561 (1983).

¹¹⁸ In the case brought in 1981 by the specialty steel industry against subsidized imports into the United States, the President did appear to agree with petitioners that the disputed practices were unfair within the meaning of Section 301. 47 Fed. Reg. 51,717 (1982). Yet, import restrictions were imposed pursuant to Section 201, the escape clause. See *infra* text accompanying notes 223-40.

¹¹⁹ 19 U.S.C. § 2413(b), amended by Trade and Tariff Act of 1984, § 304(e). Congress was persuaded by the administration's testimony that the requirement of simultaneous initiation and requests for consultations had caused problems in a number of cases in which private petitions did not provide an adequate basis for proceedings internationally. S. REP. NO. 308, 98th Cong., 1st Sess. 47 (1983). In his semiannual report to Congress on the administration of Section 301, the USTR will have to explain the reasons for delaying the requests for consultations. *Id.*

¹²⁰ H.R. REP. NO. 383, 98th Cong., 1st Sess. 13 (1983).

As a further development, Congress provided the USTR with explicit authority to self-initiate investigations.¹²¹ Congress included this provision because of its concern that in the past United States exporters with meritorious complaints of foreign unfair trade practices had refrained from filing Section 301 petitions because of possible retaliation.¹²² Apparently, Congress sought to interpose the USTR as a buffer between the private complainant with grievances and the foreign government indignant at being called upon to account for its practices. It is questionable, however, whether this device can live up to its expectations. The more specific the complaint, the more obvious its origin will be to the foreign government. Furthermore, the USTR (an Executive office) already had authority to investigate complaints of unfair trade practices on its own motion by virtue of the President's powers to act under Section 301.¹²³ By taking that avenue, the USTR is not subject to the time limits which Congress imposed on its formal self-initiating authority, limits identical to the time constraints imposed on the disposition of a private petition.¹²⁴

The 1984 Act may hold a surprise for the future, however. In addition to providing investigative authority to the USTR, Congress, rather unexpectedly, granted the USTR independent retaliatory authority. This authority is limited to cases involving export performance requirements, which foreign governments prescribe to United States corporations as a condition to permitting local investments.¹²⁵ Growing concern in Congress over such requirements, some of which related to Mexico, prompted this grant of authority. The grant of authority coincided with labor pressures to restrict off-shore sourcing.¹²⁶ Yet it remains to be seen whether the USTR will in fact exercise this unique retaliatory authority independent of the inter-agency process which ordinarily governs Section 301 cases.¹²⁷

¹²¹ 19 U.S.C. § 2412(c), *amended by* Trade and Tariff Act of 1984, § 304(d)(1).

¹²² S. REP. NO. 308, 98th Cong., 1st Sess. 47 (1983). The report also cited complainants' occasional lack of information as a legitimate reason for their reluctance to file a complaint. That reference is puzzling in view of the USTR's statutory obligation to assist potential petitioners in substantiating their complaints. 19 U.S.C. § 2415 (1982).

¹²³ *See supra* text accompanying note 27.

¹²⁴ 19 U.S.C. § 2414, *amended by* Trade and Tariff Act of 1984, § 304(d)(2)(C).

¹²⁵ Trade and Tariff Act of 1984, § 307(b). Investment-related performance requirements are discussed at *supra* text accompanying notes 54-56.

¹²⁶ Interview with Claud L. Gingrich, General Counsel, Office of the United States Trade Representative (Nov. 1, 1984).

¹²⁷ *See supra* text accompanying notes 101-03.

C. *Admissibility Requirements Pertaining to Private Complaints
Under Section 301*

The statute does not spell out in any detail the requirements a private complainant must meet before his petition under Section 301 is admissible (*i.e.*, before the USTR will initiate an investigation). Nor do the regulations implementing Section 301, which the USTR has promulgated, set out these requirements clearly.¹²⁸ Apart from demonstrating the “unfairness” of the foreign governmental practice of which they complain, petitioners (i) must have a “significant interest” in the elimination of the disputed foreign practice, and (ii) in some cases must also demonstrate that this practice “burdens United States commerce”. Even if petitioners have met the appropriate requirements, however, the USTR may still refuse to initiate an investigation if the petition presents a “wrong case”.

1. Significant Private Interest

The statute allows “any interested person” to complain of foreign unfair trade practices.¹²⁹ According to the implementing regulations, interested parties include:

- (a) an individual producer, commercial importer, or exporter of a product which is affected by the allegedly unfair foreign practice, or
- (b) collective interests, such as a trade association, or a labour organization (a unionized or non-unionized group of workers) which, unlike parties mentioned under (a), must be representative of an industry engaged in the manufacture, production or wholesale distribution in the United States of a product affected by the allegedly unfair foreign practice, or
- (c) any person representing a significant economic interest affected by the allegedly unfair foreign practice.¹³⁰

Furthermore, the regulations specify that the interested parties mentioned here must have a *significant* interest.¹³¹ This requirement suggests that a private petitioner should have more than a cursory interest in the elimination of the foreign practice about which he is complaining. Indeed, the regulations require elsewhere that the interested parties provide the USTR with information showing the volume of trade involved and the impact of the foreign practice on petitioners.¹³² Yet nowhere do the regulations specify the necessary extent of such impact. It is generally

¹²⁸ 15 C.F.R. § 2006 (1984).

¹²⁹ 19 U.S.C. § 2412(a) (1982).

¹³⁰ 15 C.F.R. § 2006.0(b) (1984).

¹³¹ *Id.*

¹³² 15 C.F.R. § 2006.1(f) (1984).

assumed that the requirement of "significant interest" does not imply a detailed showing of injury to a particular industry, comparable to the injury-threshold requirement contained in the escape clause, or antidumping and countervailing duty statutes.¹³³

What does the "significant interest" requirement stand for then? Perhaps it is a reflection of the procedural adage, "*point d'intérêt, point d'action*," (an adage known in common law jurisdictions as "*interest to sue*"). Although one should be careful in transferring notions taken from judicial procedure to a highly discretionary administrative proceeding, recalling the definition of "interest to sue" in judicial proceedings involving complaints about governmental actions is useful when interpreting the "significant interest" language in Section 301.

Briefly, a plaintiff may be assumed to have an interest to sue if a claim meets several conditions. First of all, a plaintiff's claim should not be clearly baseless. No judicial resources ought to be spent on frivolous claims. Furthermore, the plaintiff should not raise merely theoretical issues, the resolution of which will not produce any legal effect. That is different from saying that his claim should be enforceable, for the plaintiff may have an interest in obtaining a declaratory judgment to prevent recurrences of the actions or measures presented for review to the courts. In addition, the issue should be ripe for adjudication. Thus, draft regulations, or regulations which are still subject to administrative appeal, cannot be reviewed by a court (unless they threaten to cause irreparable damage to the plaintiff). Next, judicial review should be appropriate. If another remedy is available to the plaintiff, which is less onerous to the defendant or better suited to deal with his claim, the plaintiff should pursue that remedy. Finally, the plaintiff's claim should not result in an abuse of procedure. Typically, it would be an abuse of procedure to invoke a remedy for a different purpose than for which the remedy was granted.¹³⁴

If one substitutes "USTR" for "courts" and if one considers complaints about practices of *foreign* governments, certain interesting parallels may be drawn.

The Section 301 regulations suggest and practice confirms that the USTR will not initiate an investigation if the complaint does not appear to raise meritorious issues. Petitioners must indicate how their complaint relates to the practices which Section 301 condemns. Thus, they must demonstrate why the disputed practice conflicts with a trade agree-

¹³³ Fisher & Steinhardt, *supra* note 28, at 631.

¹³⁴ P. VAN DIJK, JUDICIAL REVIEW OF GOVERNMENTAL ACTION AND THE REQUIREMENT OF AN INTEREST TO SUE 21-25 (1980).

ment, or how the practice otherwise denies benefits to which the United States is entitled under a trade agreement (e.g., the GATT).¹³⁵

Furthermore, the USTR is not likely to entertain complaints which simply seek to assert theoretical principles of international trade law. In fact, as will be discussed below, the USTR may refuse to investigate a complaint which demands a correct interpretation of GATT commitments undertaken by a foreign government (i.e., a “declaratory judgment”), if the USTR deems the complaint to raise a “wrong case”.¹³⁶

So far, the USTR has not investigated complaints about inoperative regulations of a foreign government which might affect a petitioner. In addition, the USTR will likely inquire whether the petitioner has exhausted local remedies in the implicated foreign country, when these remedies can be considered effective.¹³⁷ Making these inquiries avoids imposing a needless burden on diplomatic exchange between the United States government and the foreign country concerned.

The President’s decision in the *specialty steel* case, analyzed below, suggests that in evaluating a Section 301 complaint, the Executive is not averse to considering whether other United States remedies are more appropriate (and less offensive to the foreign government concerned).¹³⁸ Such considerations seem pertinent particularly with respect to complaints about foreign government practices which affect domestic sales of a petitioner in the United States, because in those instances petitioners generally have available other remedies such as escape clause, antidumping or countervailing duty actions.

Lastly, no complaints readily come to mind of abuse of the Section 301 procedure. An example of an abuse might be a United States labor organization bringing a politically-inspired complaint about arguably unfair trade practices of a foreign government because, for example, the foreign government refused to recognize union rights. The Executive does consider, however, non-trade related issues in Section 301 proceedings and might conceivably admit a complaint of this kind.¹³⁹

¹³⁵ 15 C.F.R. § 2006.1(f) (1984).

¹³⁶ See *infra* text accompanying notes 161-83.

¹³⁷ Interview with Jeanne S. Archibald (Chairman of the Section 301 Committee), *supra* note 105. See also S. REP. NO. 308, 98th Cong., 1st Sess. 46 (1983) (where the Senate Finance Committee insists, in connection with 301-complaints about inadequate protection of United States intellectual property rights by foreign governments, that a key factor in the USTR’s determination of whether to initiate an investigation should be “a consideration of the appropriate legal action available to, or taken by, the aggrieved United States party to defend its rights in the subject country”).

¹³⁸ See *infra* text accompanying notes 223-40. In this case, however, the complaint was admitted under Section 301 before the President decided that a different course of action was more appropriate.

¹³⁹ See *supra* text accompanying note 103. Consider, for example, United States withdrawal of

In sum, with some imagination and due reserve it is possible to interpret the "significant interest" requirement in Section 301 as being analogous to the concept of "interest to sue" in judicial proceedings involving governmental actions. Yet "significant interest" may not be the only admissibility requirement. In some cases, petitioners also need to demonstrate that the disputed practice has a broad-ranging impact, extending beyond their own interests.

2. Burden on United States Commerce

The regulations implementing Section 301 suggest that a petitioner invariably must show, in addition to having a significant interest in the elimination of the disputed foreign practice, that this practice burdens United States commerce.¹⁴⁰ Some commentators have justified this requirement by comparing Section 301 to import relief remedies established by United States trade law, which do not allow *de minimis* allegations,¹⁴¹ or by pointing to GATT customs, which allegedly frown upon complaints about practices having only a negligible impact on the trade of the complaining country.¹⁴²

Contrary to the Trade Act of 1974, however, the amended version of Section 301 in the Trade Agreements Act of 1979 exclusively refers to a burden on United States commerce in connection with complaints which do not allege violations of a trade agreement, but which invoke the "unreasonableness" standard.¹⁴³ Consequently, the statute does not seem to bar an investigation of complaints involving GATT commitments, in the event a petitioner is unable to demonstrate that the disputed practice adversely affects United States commerce as a whole. The statute ought to be literally interpreted. The burden on United States commerce requirement only applies to complaints of "unreasonable"

MFN-treatment from Poland in 1982 following the crack-down on the Solidarity movement. When Poland challenged the United States before Gatt, the United States attempted to justify its actions exclusively in trade terms (*e.g.*, by arguing that Poland had been unable to fulfill its import commitments under GATT, which was strongly contested by the Polish government). GATT ACTIVITIES IN 1983 62-63 (June 1984). See also GATT Ministerial Declaration, para. 7(iii), *supra* note 37, at 11 (providing that the Contracting Parties should abstain from taking restrictive trade measures for reasons of a non-economic character).

¹⁴⁰ See 15 C.F.R. § 2006.1(f) (1984). Thus a petitioner is required to provide "specific information showing the volume of trade involved and the impact on petitioner *and* on U.S. commerce" (emphasis supplied). *Id.*

¹⁴¹ Fisher & Steinhardt, *supra* note 28, at 602 n.160.

¹⁴² See Coffield, *Using Section 301 of the Trade Act of 1974 as a Response to Foreign Government Trade Actions: When, Why and How*, 6 N.C.J. INT'L L. & COM. REG. 381, 391 (1981).

¹⁴³ This was confirmed in the Trade and Tariff Act of 1984. 19 U.S.C. § 2411(a)(1)(B)(ii), amended by Trade and Tariff Act of 1984, § 304(a).

practices; that is, practices which cannot be challenged under GATT law.

A comparison with import relief statutes is misplaced in determining the admissibility of a Section 301 complaint. The objective of the traditional trade remedies, which the import relief statutes provide, is to determine whether petitioners are entitled to protection on their domestic market through the imposition of trade restrictions on particular kinds of injurious imports.¹⁴⁴ In contrast, the unique function of Section 301 is to help remove foreign trade barriers which unfairly curtail United States exports. That objective is rarely achieved through the imposition of retaliatory trade restrictions by the United States.

Furthermore, it is not necessarily true that GATT dispute settlement procedures only allow complaints about unfair practices which substantially impair the trade of a contracting party. Indeed, requiring petitioners to prove in every case, before the USTR will investigate a complaint, that the foreign practice is not only of significant interest to them but also burdens United States commerce in a wider sense, would largely defeat the purpose of Section 301 to vigorously enforce United States rights under the GATT.

*a. Example: complaint about discriminatory
government procurement*

Suppose a medium-sized United States manufacturer enters a bid for a government purchasing contract in a signatory country to the Government Procurement Code. The contract's value barely exceeds 150,000 Special Drawing Rights (roughly \$150,000),¹⁴⁵ the threshold amount for the application of the Code.¹⁴⁶ After the responsible foreign government agency grants the contract and discloses details of the bidding process, the United States manufacturer concludes that he has been discriminated

¹⁴⁴ Recently, a number of authors have argued that domestic investigations into the propriety of import restricting measures should only be concerned with evaluating the level of injury suffered by domestic producers. Analyzing whether injurious imports are fairly or unfairly traded is an unnecessary, if not irrelevant, exercise in their view. Accordingly, distinctions between escape clause investigations (into fair but injurious imports) and antidumping or countervailing duty investigations (into unfair and injurious imports) would disappear. The "Injury-Only" School is discussed in G.C. HUFBAUER & J. ERB, *SUBSIDIES IN INTERNATIONAL TRADE* 19-21 (1984).

As long as these distinctions are maintained, different injury standards apply. Thus, the United States escape clause contains a more exacting ("serious") injury requirement than the countervailing duty and antidumping law, which sets forth a lower ("material") injury threshold. Compare 19 U.S.C. § 2251 (1982) (escape clause) with 19 U.S.C. § 1671 (1982) (countervailing duty law) and 19 U.S.C. § 1673 (1982) (antidumping law).

¹⁴⁵ On Nov. 27, 1984, one SDR equalled \$0.99. *Financieel Dagblad*, Nov. 29, 1984, at 8.

¹⁴⁶ Government Procurement Code, art. I(1)(b).

against. Though the manufacturer's bid met the published specifications and was offered at the lowest price of all entries, the foreign government agency awarded the contract to a domestic manufacturer. The United States manufacturer turns to the USTR and submits a complaint under Section 301 because of this plausible violation of the Government Procurement Code.¹⁴⁷

The United States manufacturer would be hard-pressed trying to demonstrate that the refusal of the foreign government contract burdens United States commerce, other than by frustrating its own interest (which in monetary terms may be limited to the profit margin on a \$150,000 contract). Perhaps it was the only United States manufacturer entering a bid; and even if there were other United States entries, its bid presumably was the only one qualifying for the contract. In that event, the foreign government's refusal to award the contract to other United States bidders would have been entirely consistent with the Code.

Admitting and pursuing this complaint before the GATT would be in accordance with the Government Procurement Code. The dispute settlement provisions of the Code do not set minimum requirements as to the volume of trade involved before complaints about Code violations are admitted.¹⁴⁸ The Code signatories may take the trade volume affected by the disputed practice into account, if at all, during the last stage of the procedure. Should the party held to be violating the Code not accept the recommendations of the supervisory Committee (representing the Code signatories), the Committee may authorize the complaining party to suspend the application of the Code in whole or in part to the implicated party, if the Committee considers that "the circumstances are serious enough to justify such action".¹⁴⁹

b. Extrapolation

The above example illustrates that a contracting party can successfully complain about transgressions of a GATT norm, even though their trade impact is limited. Generally speaking, the applicant party's showing that the disputed practice constitutes a violation of an explicit provi-

¹⁴⁷ *Id.* at art. V(14)(f). Note that in the final analysis the government's purchasing authorities are not tied to objective criteria such as the tender's price, but have discretion to award a contract to the tender which they determine to be "the most advantageous" in light of the evaluation criteria they have developed (and published). In subsequent dispute settlement proceedings, the Code's signatories, therefore, are called upon to judge whether the disputed purchasing decision was or was not "reasonable." Bourgeois, *supra* note 2, at 14.

¹⁴⁸ See Government Procurement Code, art. VII(4), (6), and (7) (assuming, of course, that the Code's threshold value has been met).

¹⁴⁹ *Id.* at art. VII(14).

sion of the General Agreement is considered to be a *prima facie* case of nullification or impairment. Thus, the breach of a rule is presumed to adversely affect the applicant party.¹⁵⁰

Yet one should differentiate between various complaints of GATT infringements. There are instances in which a determination of nullification or impairment does depend on the effects of a disputed practice. For example, export subsidies on agricultural products or domestic subsidies can only be challenged under the rules of the Subsidies Code if their impact on the applicant party is measurable.¹⁵¹ Furthermore, when the applicant party brings a complaint of non-violation nullification or impairment, it must provide a detailed justification of its allegations, which generally involves a showing that the disputed trade practice has a significant trade impact.¹⁵²

In all cases, once the Contracting Parties have determined that the disputed practice denies GATT benefits to the applicant and the respondent party fails to withdraw or amend the measure concerned, they will take trade impact into account. Only if the circumstances are serious enough—if the trade impact of the condemned practice is significant—will the Contracting Parties authorize the applicant party to retaliate.¹⁵³ The possibility of retaliation by no means guides GATT dispute settlement proceedings, however, because its effects are counter-productive to the liberalization of international trade. Moreover, retaliation may not impress the offending country at all, which is borne out by the one case in GATT history in which the Contracting Parties did authorize retaliation.¹⁵⁴

¹⁵⁰ Paragraph 5 of the Annex to the Tokyo Understanding on GATT dispute settlement proceedings, *supra* note 37.

¹⁵¹ Export subsidies on agricultural products can only be challenged under the Subsidies Code if they give the subsidizing country a "more than equitable share of world export trade." Subsidies Code, art. 10(1). In order to challenge domestic subsidies granted by a signatory to the Code, the applicant party has to demonstrate that they (threaten to) cause "injury to a domestic industry", or "serious prejudice" to its own interests, or nullification or impairment of the benefits accruing to it under the General Agreement, "in particular where such subsidies would adversely affect the conditions of normal competition." *Id.* at art. 11(2).

¹⁵² Paragraph 5 of the Annex to the Tokyo Understanding on GATT dispute settlement proceedings, *supra* note 37. The concept of non-violation nullification or impairment in the General Agreement is discussed at *supra* text accompanying note 41. It is yet unclear what the practice will be under those Tokyo Codes which do not follow the 1979 Understanding Regarding the Application of GATT, art. XXIII, since no non-violation complaints have been brought under the Codes so far.

¹⁵³ *Id.* at 4.

¹⁵⁴ Especially in those instances where smaller countries retaliate against big powers, it is doubtful whether they can muster enough bargaining chips to persuade the offender to change its practices. One has to recognize that retaliation measures may easily burden the economy of the retaliating country (e.g., import restrictions on products from the offending country can raise the price of imports from other sources, if any, or create domestic shortages). This is illustrated by the

The main objective of GATT dispute settlement is to eliminate "unfair" trade restrictions. The threat of retaliation rarely achieves this objective. Rather, the Contracting Parties strive to meet this objective through mounting international pressure, starting with bilateral consultations. That failing, multilateral conciliation efforts and adjudicatory proceedings before a panel bring additional pressure to bear upon the respondent party. If the litigating parties have not reached a satisfactory solution by then, international pressure will culminate in the normative stance adopted by the GATT Contracting Parties in the dispute. The GATT's drafters already anticipated this process when they negotiated the dispute settlement mechanism.¹⁵⁵

Against this background, the potential for retaliation should be of no concern in examining the admissibility of Section 301 petitions which involve GATT commitments. Otherwise, considerations come into play which risk being irrelevant, such as the possible effects of retaliatory measures on consumers and other sectors of the domestic economy. Instead, the test ought to be whether the petitioner is able to show that the United States government has cause to appeal to the GATT's normative authority. In other words, petitioner's allegations must amount to a plausible claim of GATT-inconsistent behavior by the incriminated foreign government; a prerequisite which constitutes one of the elements of an "interest to sue."¹⁵⁶

Petitioners can substantiate a considerable number of Section 301 complaints involving GATT law without having to prove a broad-ranging impact of the disputed practice on United States trade. Precedent supports this proposition. In 1982, the USTR admitted a Section 301 complaint about a Canadian duty remission scheme. Only one manufacturer of front-end loaders filed this complaint, even though several other manufacturers also had dealings with Canada. Petitioner rested its individual complaint in part on GATT norms. The USTR initiated an investigation without referring to the possible effects of the Canadian practice on petitioner, its United States competitors, or United States commerce as a whole.¹⁵⁷

one case in which the GATT Contracting Parties authorized retaliation, to wit, permitting the Netherlands to restrict United States shipments of wheat flour in response to United States dairy quotas. GATT, 1st supp. BISD 32 (1953). The Netherlands never enforced the quota, apparently on account of its ineffectiveness in removing the United States import restrictions on dairy products. Hudec, *supra* note 36, at 507.

¹⁵⁵ Hudec, *supra* note 35, at 186.

¹⁵⁶ See *supra* text accompanying notes 134-35.

¹⁵⁷ 47 Fed. Reg. 51,029 (1982). See also the USTR's admission in 1979 of a complaint submitted by one insurance company about the refusal of the Korean government to permit this particular company to write insurance policies covering marine risks. 44 Fed. Reg. 75,146 (1979).

Still, the USTR asserts that it has discretion to reject Section 301 petitions on policy grounds alone, irrespective of the merits of the petition.¹⁵⁸ Undoubtedly, from the Executive's perspective, these policy grounds can also be unconnected with considerations which would play a role in appraising a petitioner's "interest to sue." Such considerations include whether local remedies in the foreign country, if any, are effective and should be exhausted, or whether other remedies of United States domestic law are better suited to deal with the complaint.¹⁵⁹ In essence, the USTR appears to claim that it has virtually unlimited discretion to admit Section 301 petitions.

With respect to GATT-related petitions, however, this claim is not justified. Congress explicitly established a presumption that the USTR ought to investigate plausible complaints of GATT inconsistencies.¹⁶⁰ All things considered, no decisive arguments seem to recant this Congressional presumption.

3. Wrong Cases

A word of caution is in order if one proposes to facilitate private access to Section 301. When the Tokyo Round negotiators reviewed the GATT's dispute settlement machinery, one school of thought argued that there was a danger in having panels rule routinely that governments violate the GATT. If governments fell into the habit of not complying with panel rulings, the coercive force of GATT norms and their interpretations might suffer as a result. According to this view, therefore, governments should restrain use of the panel procedure in order to avoid "wrong cases" inviting non-compliance.¹⁶¹ By the same token, the argument could be made that the broad discretion asserted by the Executive in admitting 301 petitions is justified. Following this view, the USTR can easily avoid investigating an apparently valid, but controversial, complaint, which might lead to embarrassments in GATT.

On close examination, however, concern about "wrong cases" does

¹⁵⁸ Archibald, *supra* note 107, at VII-5.

¹⁵⁹ See Fisher & Steinhardt, *supra* note 28, at 578 ("the standards which guide the President's decision (to enforce trade rights of petitioners) may have much more to do with the timing of the petition, domestic publicity, relations with Congress, and foreign policy than with the merits of the petition").

¹⁶⁰ See S. REP. NO. 249, 96th Cong., 1st Sess. 238 (1979) (while recognizing the Executive's general discretion as to whether to initiate a 301-investigation, the Senate Finance Committee insisted that regarding the Tokyo Codes "this discretion normally should be exercised by proceeding to investigate and to pursue valid claims in appropriate international fora by section 301 as amended by this bill").

¹⁶¹ Hudec, *supra* note 35, at 159.

not warrant a grant of unlimited discretion to the Executive to decide whether or not to investigate private complaints.

a. The concept

"Wrong cases" in the GATT are said to arise from several sources: politically imperative violations in times of economic and political instability when governments are easily influenced by special interest groups, complaints reaching beyond the panel's decision-making capacity, or violations of outdated rules.¹⁶²

If governments can find no other justification, they will be tempted to argue that measures restricting imports are politically imperative. Yet it is difficult to predict at the outset of an investigation how imperative import restrictions really are. When an unfavourable GATT ruling is imminent, compliance with the international norm often appears possible after all. Furthermore, if a government feels unable to fully comply with a GATT ruling, limited improvement in a post-decision compromise may be possible.¹⁶³ Also, the complaining government may refer to established, yet unresolved, violations in later negotiations with the offending government when the latter requests concessions.

In sum, there is no reason not to investigate private complaints which seem to raise sensitive issues. The investigation frequently will reveal how "political" the offensive restrictions are in fact. Besides, once a violation has been established, the GATT membership and the complaining government can take politics into account when they decide on the propriety of retaliation.

Worry that "wrong cases" might overextend the GATT's decision-making capacity underestimates the avoidance techniques which GATT panels have developed. Practice shows that panels are likely to pressure disputing parties to reach a settlement, especially when panels are faced with difficult issues.¹⁶⁴ Or the panels may simply conclude that they cannot decide the issue put before them.¹⁶⁵ Again, this concern does not justify unqualified Executive discretion.

The question remains whether complaints about arguably outdated or overbroad GATT rules vindicate extensive Executive discretion. These complaints do not pose a problem so much for the GATT membership as they do for a national government entertaining the complaint. Panels, for better or for worse, tend to reconcile GATT rules with the

¹⁶² *Id.* at 159-66.

¹⁶³ *Id.* at 167.

¹⁶⁴ *Id.* at 188-89.

¹⁶⁵ *Id.* at 189-92.

current international consensus through “creative” interpretations, such as limiting the rule’s application, or avoiding explosive issues.¹⁶⁶ In contrast, these complaints can embarrass a national government.

By lodging a complaint against a foreign country which allegedly violates a GATT rule, petitioners may object to foreign practices which the United States engages in itself or which it condones. If the United States were to bring these petitions before GATT, it would lose credibility, if not the case.¹⁶⁷ At the same time, the USTR may shrink from calling attention to the rule’s controversial application in refusing an investigation of these petitions under Section 301. Any public interpretation of the rule, such as qualifying it as being outmoded under Section 301, could easily immobilize the Executive’s position in international negotiations.

b. The A.I.S.I. complaints

In December of 1982, the American Iron and Steel Industry (“A.I.S.I.”) filed a typical “wrong case”. The petition was directed against Japan and complained of an agreement which Japan had concluded with the European Community restraining its steel exports to the Common Market. The A.I.S.I. alleged, *inter alia*, that this VRA diverted significant quantities of Japanese steel from the Common Market to the United States, thereby injuring the United States steel industry. According to the A.I.S.I., by entering into this agreement, Japan had violated its commitments under the GATT (notably Article XI, prohibiting quantitative export restrictions).¹⁶⁸

In 1976, the A.I.S.I. had lodged a similar complaint with the USTR, the first petition under Section 301 which involved the United States domestic market.¹⁶⁹ Following a lengthy 15-month investigation, the President decided not to take action. He reasoned that the VRA which Japan had then negotiated with the Community did not appear to adversely affect United States commerce. The President’s decision did not address the GATT-related arguments presented by the A.I.S.I.¹⁷⁰

The timing of the 1982 petition is noteworthy. It followed almost immediately the negotiation of an agreement between the United States and the Community. This agreement restrained the Community’s steel

¹⁶⁶ *Id.* at 192-97.

¹⁶⁷ See *supra* text accompanying notes 41-44 (reflecting on non-violation complaints).

¹⁶⁸ See 48 Fed. Reg. 8,878 (1983) (notice of decision not to initiate an investigation).

¹⁶⁹ 41 Fed. Reg. 45,268 (1976) (notice of complaint).

¹⁷⁰ 43 Fed. Reg. 3,962 (1978) (notice of termination).

exports to the United States.¹⁷¹ Having reduced the threat of European steel imports, the United States steel industry sought to restrict access of Japanese suppliers to the American market. Filing a Section 301 petition to achieve this objective was rather ingenious because anti-dumping or countervailing duty actions against Japanese steel producers traditionally have not been very successful and an escape clause action, necessarily involving all steel exporting countries,¹⁷² would have jeopardized the VRA the United States had negotiated with the Community (and its steel producers) only several months before.¹⁷³

At first glance, it seems inconceivable that the A.I.S.I. could argue that the VRA between Japan and the Community violated the GATT, in the face of a similar arrangement between the Community and the United States. Yet one can technically distinguish these two arrangements because the later was the result of United States antidumping and countervailing duty proceedings. Although the General Agreement only provides for the imposition of customs duties to offset the unfair price advantage of subsidized or dumped imports, the Subsidies Code also allows importing countries to take other measures (such as the negotiation of export restraints) to counter the effects of foreign subsidies.¹⁷⁴ The distinction between these two agreements is tenuous,¹⁷⁵ however, and

¹⁷¹ The text of this arrangement is *reprinted* in 25 O.J. EUR. COMM. (No. 1 307) 13 (1982). *See infra* note 226.

¹⁷² *See infra* text accompanying note 216.

¹⁷³ The European Community conditioned its agreement to restrain steel exports to the United States on the understanding that European steel producers would not be subject to, *inter alia*, further United States countervailing duty, antidumping or escape clause actions. *See* art. 2(a)(2) of the arrangement, *supra* note 171. This did not keep United States steel producers from filing an escape clause action in January 1984. The Executive avoided the break-up of the arrangement with the European Community by rejecting global import relief under Section 201. Instead, President Reagan instructed the USTR to negotiate with "surge control" arrangements (*i.e.*, voluntary restraint arrangements, hereinafter referred to as "VRAs") with unspecified countries, implicitly excluding the European Community. 49 Fed. Reg. 36,813 (1984).

¹⁷⁴ Subsidies Code, art. 4(5)(a).

¹⁷⁵ The steel VRA negotiated between the United States and the European Community arguably does not conform with the Trade Agreements Act of 1979, since it did not arise on suspension of the antidumping and countervailing duty investigations. E. MCGOVERN, *supra* note 1, at § 16.123 (1983 supplement). This arrangement also raises questions under the Subsidies Code, in that it seems to go further than merely off-setting foreign subsidies, but rather is linked to the import penetration of European steel. Art. 4(a) of the arrangement sets ceilings on carbon steel imports from the European Community, which are expressed in percentages of the projected United States apparent consumption. Bronckers, *Reconsidering the Non-Discrimination Principle as Applied to GATT Safeguard Measures, A Rejoinder*, 9 LEGAL ISSUES OF EUR. INTEGRATION 113, 132-33 (1983/2). In addition, art. 7 of the Dumping Code, corresponding to art. 4(5)(a) of the Subsidies Code, does not contain language which would cover agreements restraining the *quantity* of allegedly dumped imports. Thus, the steel agreement, to the extent it related to antidumping investigations, is of dubious validity under the Dumping Code. *See generally* Benyon & Bourgeois, *The European Community-United States Steel Arrangement*, 21 COMMON MKT. L. REV. 305 (1984).

would not have saved the Executive from embarrassment if it had brought this case before the GATT.

Besides, on other occasions, the United States government itself has negotiated VRAs outside antidumping or countervailing duty proceedings. Sometimes these arrangements were negotiated pursuant to the escape clause procedure (e.g., as part of the 1983 specialty steel program discussed below¹⁷⁶). At other times, the Executive elicited export restraints in complete disregard of national escape clause investigations (e.g., the restraints it negotiated with Japan in 1981 affecting the latter's car exports to the United States¹⁷⁷). In both cases, the status of these arrangements under the GATT is dubious.

Most often, countries do not notify VRAs to GATT. And even if they do, VRAs appear to elude the grasp of the General Agreement. Many hold the view that VRAs are not covered by GATT, in particular by Articles XI (containing the ban on quantitative restrictions) and XIX (containing a qualified exception to Article XI with respect to safeguard measures). If one takes into account the distinction under United States law between Orderly Marketing Arrangements and Voluntary Export Restraints,¹⁷⁸ the former arguably are excluded from GATT control because they constitute bilateral agreements, as opposed to unilateral import restrictions, while the latter evade control because the export reduction is "voluntarily" effected by the supplier country.¹⁷⁹ Indeed, the ultimately abortive attempt to revise the GATT escape clause in the Tokyo Round negotiations centered on the need to encompass and confine the use of VRAs.

Against this background, one can appreciate the delicacy of A.I.S.I.'s complaint. The Executive could not really pursue this petition and challenge Japan before the GATT, without calling its own actions into question. On the other hand, in rejecting the complaint on the grounds that GATT does not exercise effective authority over VRAs, the Executive might have lost leverage in the current negotiations on a revised GATT escape clause (e.g., by admitting to inadequacies in the GATT's policing powers regarding national safeguard measures).

Balancing these alternatives, it does not come as a surprise that the

¹⁷⁶ See *infra* text accompanying notes 223-40. Since the specialty steel program combined unilateral restrictions on imports from certain suppliers with VRAs negotiated with other suppliers, it arguably is inconsistent with GATT, art. XIII. Bronckers, *supra* note 175, at 119 n.24, 120-21.

¹⁷⁷ See Waller, *Redefining the Foreign Compulsion Defense in U.S. Antitrust law: The Japanese Auto Restraints and Beyond*, 14 LAW & POL'Y INT'L BUS. 747, 757-70 (1982) (arguing that the Executive's actions in this case are vulnerable to challenge under United States law).

¹⁷⁸ See *infra* note 213.

¹⁷⁹ See generally Bronckers, *supra* note 175, at 130.

USTR refused to investigate A.I.S.I.'s 1982 complaint.¹⁸⁰ The reasoning of its decision reflects the Executive's awkward position, however. Not too convincingly and without further argument, the USTR first agreed with petitioners that the VRA between Japan and the European Economic Community was inconsistent with Article XI of the GATT. It then continued:

However, the petition fails to present evidence to demonstrate that U.S. benefits under the GATT have been nullified or impaired by reason of the GATT-inconsistent measure. The petition does not include specific information relating to the impact on petitioners and on U.S. commerce arising from the alleged foreign practices.¹⁸¹

Admittedly, the petition did not give any indication as to the trade-divertive effect of this VRA. Thus, the A.I.S.I. arguably failed to establish a significant interest (*i.e.*, an "interest to sue") because it appeared to raise a point of theoretical interest.¹⁸² Yet one wonders how the Executive would have handled this complaint, if the A.I.S.I. had been able to demonstrate diversion of Japanese steel exports to the United States. Japan did not put the United States government to the test, however, and voluntarily kept its steel exports to the United States in check.¹⁸³

In summary, much of the concern about "wrong cases" should not detain admission of private complaints under Section 301. Many "wrong cases" prove to be right after all. The Executive will screen these few cases which are "wrong" indeed, as its disposition of the A.I.S.I. complaints demonstrates. One may quibble about the methods used to reject an occasional "wrong case". Yet, this should not detract from the presumption that the Executive ought to investigate every complaint brought by a petitioner who has established an interest to sue, at least to the extent the complaint relies on GATT commitments of a foreign government.

¹⁸⁰ Under the rudimentary 301-procedure contained in the Trade Act of 1974, the Executive had no choice but to investigate the complaint brought by the A.I.S.I. in 1976. See Trade Act of 1974, § 301(d)(2).

¹⁸¹ 48 Fed. Reg. 8,878 (1983).

¹⁸² See *supra* text accompanying note 134. Contrast the A.I.S.I. decision with the front-end loader case, *supra* note 157. There, the USTR did initiate an investigation into a complaint which was based, in part, on GATT norms, without assessing the effects of the disputed practice on petitioner or United States commerce, or even determining that this practice was inconsistent with GATT.

¹⁸³ See 48 Fed. Reg. 8,878-9 (1983) (following talks between the USTR and the Japanese government, the latter "stated its intention not to cause such nullification or impairment through any government action, including the establishment of conditions of export").

D. International Investigation and Retaliation

Once the USTR admits a petition, Section 301 places certain responsibilities on the United States government to take action on the international plane. With respect to GATT-related complaints, the USTR must request consultations with the incriminated foreign government on the date on which the investigation was initiated, or at least within 90 days after such initiation.¹⁸⁴ If no resolution is reached during these consultations, the statute instructs the USTR to “promptly” request formal dispute settlement proceedings.¹⁸⁵ These statutory instructions can be a powerful bargaining chip in the hands of a private petitioner who seeks the elimination of a foreign unfair trade practice. Faced with the threat of a Section 301 petition, a foreign government may prefer to quickly seek an informal settlement, rather than appearing in the limelight of a public proceeding.

In 1980, for instance, the United States Rice Millers' Association (“RMA”) filed a petition under Section 301, alleging that the Japanese government subsidized exports of rice, an act which displaced United States rice exports in violation of GATT rules and of principles adopted by the United Nations Food and Agriculture Organization. Before the USTR had even decided on the admissibility of the complaint, bilateral consultations with the Japanese government were successfully concluded, and the RMA withdrew the petition.¹⁸⁶ In 1984, the RMA scored a similar success. In this instance, it had complained that Taiwan subsidized rice exports. After the USTR had admitted its complaint in October 1983 and had held consultations with Taiwanese authorities, the RMA withdrew its petition in March 1984, following an understanding which limited the quantity of subsidized rice exports from Taiwan.¹⁸⁷

Of course, each case filed under Section 301 which involves GATT law does not result in relief forthcoming at such short notice. It may

¹⁸⁴ 19 U.S.C. § 2413(a), *amended by* Trade and Tariff Act of 1984, § 304(e). *See supra* text accompanying note 119.

¹⁸⁵ 19 U.S.C. § 2413(a), *amended by* Trade and Tariff Act of 1984, § 304(e). Other than the Subsidies Code, no Tokyo agreement indicates a consultation period; nor does the General Agreement. *See supra* table 2 (following text accompanying note 109). In those cases, Congress envisioned that the USTR would devote “a reasonable amount of time” to consultations and efforts at conciliation before invoking dispute settlement proceedings. S. REP. NO. 249, 96th Cong., 1st Sess. 239 (1979).

¹⁸⁶ Fisher & Steinhardt, *supra* note 28, at 619-20.

¹⁸⁷ 49 Fed. Reg. 10,761 (1984). Taiwan, incidentally, is not a party to GATT. From the notice of initiation, it appears the RMA had already filed a 301-complaint in July 1983, which it withdrew in late August of that year “to provide an opportunity for a negotiated solution.” 48 Fed. Reg. 56,289 (1983). The course of events in this case illustrates how private petitioners use the bargaining power created by a Section 301-proceeding.

take quite some time before the foreign government succumbs to the pressures exercised by the United States government and, ultimately, by the GATT membership (or, as the case may be, the signatories of a particular Code). In some cases, the foreign government may resist a negotiated solution or may refuse to accept a panel-recommendation without delay.¹⁸⁸ Petitioners' frustration over the foreign government's apparent intransigence is apt to increase as time goes by. Because the Executive is empowered to disregard the outcome of GATT proceedings, the affected United States industry can be expected to demand unilateral retaliation at some point. Congress, however, allowed the President considerable freedom in determining whether retaliation would be "appropriate and feasible" to eliminate foreign unfair trade practices.¹⁸⁹ So far, the President has not exercised his retaliatory authority.¹⁹⁰

Presidential inaction has provoked a variety of proposals which would increase the likelihood of United States retaliation, either by limiting Presidential discretion directly, or by transferring investigatory authority from the USTR to another government agency. As early as 1962, the Senate considered an amendment to Section 252 of the Trade Expansion Act which would have compelled the President to act whenever United States exporters were confronted with foreign barriers to trade.¹⁹¹ The Kennedy Administration strongly objected to this amendment, arguing that such an automatic response "would serve only to promote economic warfare".¹⁹² The Administration apparently convinced the Senate, for this amendment was not adopted.

In 1979, Senator Dole proposed to remove the responsibility of administering Section 301 from the USTR, an Executive office, to the United States International Trade Commission, an agency independent from the Executive. Under this proposal, the President still had the authority to review and to make decisions on the ITC's recommendations. Congress would have had the power, however, to approve or disapprove his decision; Congressional disapproval would have resulted in the ITC's

¹⁸⁸ GATT Council and Tokyo Code Committee decisions are based on consensus rather than majority rule. Archibald, *supra* note 107, at VII-8. As a result, the losing party can block the adoption of a panel ruling or extract a qualification of the panel's holding in exchange for its consent to adoption.

¹⁸⁹ 19 U.S.C. § 2411(a) (1982). Congress merely expressed its expectation that "swift and certain retaliation" would follow in the event foreign trading partners of the United States "insist on maintaining unfair advantages." S. REP. NO. 1298, 93d Cong., 2d Sess. 164 (1974).

¹⁹⁰ See generally *supra* text accompanying notes 47-50. But see text accompanying notes 393-403.

¹⁹¹ 1962 Senate Hearings, *supra* note 83, at 1128 (text) and 1855 (comments by sponsor, Senator Prescott Bush).

¹⁹² *Id.* at 1893. (Senator Bush's rebuttal can be found at *id.* at 1903.)

recommendations taking effect.¹⁹³ The Carter Administration, supported by the House, firmly opposed this Amendment which was ultimately withdrawn.¹⁹⁴

Most recently, proponents of the new reciprocity concept, which compares the equivalence of remaining import restrictions,¹⁹⁵ generally share the belief that the United States should be more willing to unilaterally retaliate against foreign trade barriers.¹⁹⁶ Some of them go so far as to argue that the policy of reducing trade barriers through multilateral negotiation or dispute resolution should be abandoned. Henceforth, the United States ought to pursue a "Tit for Tat" strategy regarding GATT contracting parties.¹⁹⁷

In the Trade and Tariff Act of 1984, Congress did not issue such far-reaching directives for retaliatory action to the Executive. The President retained his discretionary authority to take "appropriate and feasible" action under Section 301. On the other hand, the new law does require the USTR to prepare analyses of significant foreign trade barriers and to estimate their trade impact.¹⁹⁸ Interestingly, in each of these yearly reports to Congress the USTR must articulate, where appropriate, its reasons for not taking action under Section 301 or other authority to eliminate the trade barriers which he has identified.¹⁹⁹ While not prescribing any particular action, Congress expressed its intention that the USTR vigorously proceed against unfair trade practices.²⁰⁰ Yet it is significant that the Senate Finance Committee stated in so many words that the USTR ought to give priority to tackling those trade barriers "with respect to which there is the greatest likelihood of achieving solutions, *particularly within accepted international procedures* (emphasis

¹⁹³ *Hearings before the Subcommittee on International Trade of the Senate Finance Committee*, 96th Cong., 1st Sess. 111-12 (1979).

¹⁹⁴ Based on an internal memorandum entitled "*Conference Document*, consultations on implementing legislation for the Tokyo Round of Multilateral Trade Negotiations" prepared by the staffs of the House Committee on Ways and Means and the Senate Committee on Finance (May 21, 1979).

¹⁹⁵ See generally *supra* text accompanying notes 57-72.

¹⁹⁶ See Gadbow, *supra* note 29, at 735-36.

¹⁹⁷ Goldstein & Krasner, *Unfair Trade Practices: The Case for a Differential Response*, 74 AM. ECON. REV. 282 (1984). Without hesitation, these authors assert that "Tit for Tat is not aimed at starting a trade war. It is a program that should elicit cooperation and 'freer' trade . . . We cannot defend liberalism unilaterally; without pressure, our trading partners *will not* act in accordance with GATT norms" (emphasis in original). *Id.* at 284-85.

¹⁹⁸ Trade and Tariff Act of 1984 § 181.

¹⁹⁹ *Id.* at § 181(b)(2).

²⁰⁰ S. REP. NO. 308, 98th Cong., 1st Sess. 43 (1983) (" . . . the USTR should consider vigorously utilizing existing authorities and dispute settlement procedures to deal with the identified barriers and distortions"). Presumably, Congress here referred in particular to the new independent investigative authority of the USTR pursuant to Section 301. See *id.* at 47.

supplied)".²⁰¹

Proposals which would unequivocally order the Executive to retaliate in response to foreign unfair trade practices, irrespective of international procedures, call for determined opposition.

Viewed in the context of a private Section 301 petition, retaliatory action on behalf of one complainant almost invariably will affect other sectors of economic activity. For instance, import restrictions affect both individual importers as well as consumers domestically, such as processing industries or citizens. Export controls by their very nature curtail United States business activity. Export incentives such as subsidies, intended to counter foreign subsidies which divert United States exports from foreign country markets, not only tax United States citizens but may upset other non-subsidizing governments, which will complain of increasing distortions in international trade. These examples further illustrate the danger of spiralling trade restrictions which retaliation creates. Moreover, independent United States action seeking to redress unfair trade practices of GATT contracting parties may well backfire, by undermining the confidence of United States trading partners in multilateral resolution of the pressures and conflicts which international exchange engenders. Finally, foreign policy considerations are still inextricably intertwined with international economic issues, and may on occasion warrant the President not to retaliate even though petitioners raised a valid complaint (and even if the GATT would have authorized retaliation).

Weakening the President's authority to weigh these factors serves no useful purpose. The President's broad authority inheres in a sound decision-making process which must balance a variety of competing interests, both national as well as international. Yet private petitioners can and should insist on adequate procedures to ensure a prompt and scrupulous investigation of their complaints on the national and on the international level. Section 301 is one mechanism to achieve a thorough investigation of private grievances. It at last allows the business community to participate in the supervision of intergovernmental trade rules. Having been removed for a long time from GATT operations affecting the marketplace, that opportunity for participation should in itself be a relief to the business community.

E. Section 301 and the United States Domestic Market

In discussing the reach of Section 301, attention is often drawn to its

²⁰¹ *Id.*

use in combatting unfair trade practices which United States industries encounter abroad.²⁰² By its terms, however, Section 301 does not exclude complaints against imports into the United States which have an unfair competitive advantage attributable to a foreign government (the obvious example being government subsidies). Moreover, the Trade Agreements Act of 1979 eliminated the requirement that the President could move against foreign exports to the United States under Section 301 only after he had determined that anti-dumping or countervailing duty action would be inadequate to deter such practices.²⁰³ The statute therefore does not contain any impediment against Section 301 complaints of unfair trade practices affecting domestic sales and investments of United States industries.

Yet there are disadvantages for private petitioners in activating the Section 301 procedure, if the injury caused by imports can be remedied through an appeal to other provisions of United States trade law. A case of subsidized imports into the United States illustrates this proposition. After reviewing various remedies a United States petitioner might consider applying for, this article will examine an actual complaint under Section 301 about subsidized imports.

1. Subsidized Imports

Threatened by subsidized imports into the United States, the affected industry would be advised to first look into the countervailing duty statute.²⁰⁴ This law has been specifically designed to offset the price difference (*i.e.*, to raise the lower price) of imported products benefiting from foreign subsidies. If the United States industry can demonstrate that the allegedly subsidized industry charges lower prices for the imported products in the United States than in its domestic market or in foreign countries, it could also invoke the antidumping law (which is procedurally equivalent to the countervailing duty statute).²⁰⁵ Alternatively, the industry could consider starting an escape clause procedure, request-

²⁰² See, *e.g.*, Jacobs & Hove, *Remedies for Unfair Import Competition in the United States*, 13 CORNELL INT'L L.J. 1, 25 (1980) ("The section 301 alternative is not useful to an American manufacturer in dealing directly with increased imports into the United States. It may be useful, however, in opening the market in the foreign country").

²⁰³ Trade Act of 1974, § 301(c). In addition, the Treasury Department had to have determined the existence of export subsidies and that the International Trade Commission, which subsidized the imports, substantially reduced the sales opportunities of competitive United States products. *Id.*

²⁰⁴ Tariff Act of 1930 tit. VII subtit. A, *amended by* Trade Agreements Act of 1979, 19 U.S.C. § 1671 (1982).

²⁰⁵ Tariff Act of 1930 tit. VII subtit. B, *amended by* Trade Agreements Act of 1979, 19 U.S.C. § 1673 (1982). The important procedural difference between the antidumping law and countervailing duty law is that the latter does not prescribe an injury test in all cases. See *infra* note 207.

ing the Executive to impose temporary import restrictions as a safeguard against further injury caused by increasing quantities of imports.²⁰⁶ Starting an escape clause procedure may be convenient if the affected industry has difficulty proving that competitively priced imports are, in fact, subsidized or dumped.

The main advantages of these remedies lie in stricter time limits imposed on Executive action, and in the more trade-oriented approach the Executive is required to take in considering these actions. The countervailing duty and anti-dumping laws in particular leave the Executive little choice but to intervene and offset foreign subsidies or price discrimination, once it has established that the subsidized or dumped imports cause or threaten to cause injury.²⁰⁷

Under certain circumstances, though, Section 301 may have some appeal to United States industries which claim to be injured by subsidized imports on their domestic market. For one thing, Section 301 appears to have a lower admissibility—threshold, compared to the countervailing duty, antidumping and escape clause remedy. In order to successfully invoke Section 301, complainants have to qualify as “interested persons” who need not always show that the disputed practices

²⁰⁶ The general escape clause is embodied in Trade Act of 1974, §§ 201-03, 19 U.S.C. § 2251 (1982). With regard to imports from communist countries, this Act sets forth a special escape clause in section 406. 19 U.S.C. § 2436 (1982). Note that escape clause proceedings are not concerned with “unfairness” in terms of trade of imported products.

The main criterion to establish whether import relief is warranted under the escape clause turns on the (threat of) injury caused by imports to a United States industry. Under section 406, Imports need only be “a significant cause of material injury” to a domestic industry, whereas section 201 requires that imports are “a substantial cause of serious injury.” By invoking section 406, petitioners can single out imports from particular communist countries, as opposed to a section 201 proceeding where all exporting countries will be taken into account to determine whether there is indeed an overall increase in imports causing serious injury to a domestic industry. Yet, section 406 has been little used, and some petitioners threatened by imports from communist countries have found section 201 more effective in obtaining relief. Baker & Cunningham, *Countertrade and Trade Law*, 5 J. COMP. BUS. & CAP. MKT. L. 375, 379 (1983).

²⁰⁷ Once it has been determined that an imported product is subsidized and causes serious injury to (e.g., materially retards the establishment of) a United States industry, a countervailing duty equal to the amount of the net subsidy “shall” be imposed. 19 U.S.C. § 1671(a) (1982). Not all countries whose exports to the United States are deemed to be subsidized benefit from the injury test, however. The injury requirement, introduced by the Trade Agreements Act, only applies to signatories of the Subsidies Code or to countries that have assumed “equivalent obligations” vis-a-vis the United States. 19 U.S.C. § 1671(b)(1) and (2) (1982). With regard to dutiable imports from other countries, countervailing duties will be levied upon the mere finding of subsidization. 19 U.S.C. § 1671(b)(3) (1982). See generally Hufbauer, Erb & Starr, *The GATT Codes and the Unconditional Most-Favored Nation Principle*, 12 LAW & POL’Y INT’L BUS. 59, 70-77 (1980) (arguing that the Subsidies Code itself does not require unconditional MFN-treatment of GATT contracting parties who have not acceded to the Code).

In contrast, the injury test is part and parcel of all antidumping proceedings. 19 U.S.C. § 1673 (1982).

burden United States commerce as a whole.²⁰⁸ Especially in the event that an individual petitioner feels harmed by export subsidies granted by a signatory to the Subsidies Code, Section 301 offers the considerable advantage that the individual petitioner is not obliged to demonstrate industry-wide injury, *i.e.*, that these subsidies harm its domestic competitors as well.²⁰⁹ The countervailing duty and antidumping statutes and the escape clause, in contrast, require petitioners to demonstrate that the disputed imports cause, or threaten to cause, "serious" or "material" injury to a particular and defined industry.²¹⁰

In addition, under the countervailing duty and antidumping statutes, petitioners must specify product-by-product and country-by-country the nature and extent of the subsidies or the dumping practices distorting the terms of trade of products imported into the United States. This requirement proves to be a tremendous hurdle in those sectors of industry where trade-distortive practices abound under many different guises (*e.g.*, steel, textiles, agriculture).²¹¹ Section 301 arguably does not require the same degree of specification.

Furthermore, both the countervailing duty and antidumping law and the escape clause offer only a limited number of options to the Executive to counteract the disputed foreign practices. The countervailing duty and antidumping statutes instruct the President to impose countervailing duties on subsidized or dumped imports.²¹² The escape clause, on the other hand, allows the President to increase the customs duty pertaining to the injurious products, directly or indirectly, through a tariff

²⁰⁸ See generally *supra* text accompanying notes 128-60.

²⁰⁹ The grant of export subsidies on manufactured products by a signatory party constitutes a *per se* violation of Subsidies Code, art. 9.

²¹⁰ See Fisher & Steinhardt, *supra* note 28, at 631 (who point out that, compared with escape clause actions, it is not a defense in Section 301 cases that factors other than the disputed foreign practices are more significant causes of injury to United States petitioners).

²¹¹ See Ehrenhaft, *What the Antidumping and Countervailing Duty Provisions of the Trade Agreements Act (Can) (Will) (Should) Mean for U.S. Trade Policy*, 11 LAW & POL'Y INT'L BUS. 1361, 1390-91 (1979).

²¹² 19 U.S.C. § 1671(e) (1982) (countervailing duty law); 19 U.S.C. § 1673(e) (1982) (antidumping law). The Executive (*i.e.*, the Commerce Department) has discretion, however, to suspend the countervailing duty or antidumping investigation (and thereby avoid the imposition of duties) in case an agreement can be reached with the governments accused of subsidization, or with the exporting companies accused of importing subsidized or dumped products into the United States, which will negate the effect of the subsidy or dumping practices with respect to United States imports. These agreements may result in a price increase or a volume reduction of allegedly subsidized or dumped imports, or a complete elimination of imports from the countries concerned. See generally, Holmer & Bello, *U.S. Import Law and Policy Series: Suspension and Settlement Agreements in Unfair Trade Cases*, 18 INT'L LAW. 683 (1984). Trade and Tariff Act of 1984, § 604 curtails the authority of the Executive to enter into quantitative restraint agreements under the antidumping or countervailing duty laws.

quota;²¹³ to modify or impose quantitative restrictions, unilaterally or through negotiation;²¹⁴ or to take any combination of such actions.²¹⁵ It is generally assumed, moreover, that an escape clause restriction must be of non-discriminatory application, also striking at countries which are not responsible for the injury inflicted on the United States industry concerned.²¹⁶ Countervailing duty and antidumping measures strike only at the "guilty" countries (they are selective).

In comparison, Congress did not limit the President's options if the President decides to take action against foreign unfair practices under Section 301.²¹⁷ Thus, Congress authorized the President not only to restrict imports of the subsidized products triggering the Section 301 complaint, but also to restrict imports of other products originating in the foreign country concerned. This latter action, however, would clearly violate the GATT²¹⁸. In addition, the President is free to retaliate by restricting services and investments originating in the subsidizing coun-

²¹³ If a tariff quota is imposed, the tariff increases will only be levied on products imported after a certain quota of these products (subject to regular tariffs) has been filled. For an example, see the tariff quotas imposed by President Reagan in 1983 on imports of heavyweight motorcycles following an escape clause investigation. 48 Fed. Reg. 17,179 (1983).

²¹⁴ Negotiated quantitative restrictions are referred to in the statute as "orderly marketing arrangements" (hereinafter referred to as "OMAs"). Under United States law, OMAs are to be distinguished from Voluntary Export Restraints (hereinafter referred to as "VERs") which the Executive negotiates outside the escape clause, often arguing that the latter constitute unilateral measures which have been voluntarily imposed by the exporting country (or industry) concerned. Thus the Executive may avoid judicial scrutiny of VERs pursuant to the holding in *Consumers Union v. Kissinger*, 506 F.2d 136 (D.C. Cir. 1974), that a number of VERs negotiated by the Executive with United States and Japanese steel producers could not be challenged by Consumers Union because, in the court's view, these arrangements were not enforceable. Whatever their legal basis in United States law, these voluntary restraint arrangements (*i.e.*, VRAs) enjoy a controversial status in the GATT framework. See *supra* text accompanying notes 178-79.

²¹⁵ 19 U.S.C. § 2253(a) (1982).

²¹⁶ This non-discrimination requirement is deduced from GATT, art. XIX. In practice, however, United States escape clause actions (as well as similar actions taken by other GATT Contracting Parties) have effectively discriminated against different exporting countries, underscoring the ambiguities surrounding a non-discriminatory interpretation of the GATT's escape clause. Indeed, the GATT Contracting Parties for some time have been considering proposals to sanction discriminatory safeguard measures. See generally M. BRONCKERS, *Selective Safeguard Measures in Multilateral Trade Relations* in ISSUES OF PROTECTIONISM IN GATT, EUROPEAN COMMUNITY AND UNITED STATES LAW (1985).

²¹⁷ Section 301 instructs the President to take "all appropriate and feasible action within his power" to obtain the elimination of foreign unfair trade practices. 19 U.S.C. § 2411(a), amended by Trade and Tariff Act of 1984, § 304(a). For a representative list of the variety of conceivable options available to the President, see Fisher & Steinhardt, *supra* note 28, at 608 (suggesting countermeasures in the case involving Canada's requirements with respect to foreign investors, discussed at *supra* text accompanying note 56).

²¹⁸ Both the General Agreement as well as the Subsidies Code instruct that countervailing measures only strike at subsidized imports. GATT, art. VI; Subsidies Code, art. 4.2.

try.²¹⁹ Since the GATT does not cover services and investments, the GATT membership could not scrutinize these actions (though service—and investment restrictions might run counter to bilateral FCN—or investment treaties which the United States has concluded with the country accused of subsidization). Furthermore, retaliatory action under this provision can, but does not have to, be country-specific.²²⁰

Finally, a United States industry planning to take action against subsidized imports must make a choice as to which remedy it wants to pursue. The USTR will refuse to initiate, or will terminate any Section 301 investigation if the petitioner is requesting a remedy to the same practice under another provision of law.²²¹ For example, the USTR terminated an investigation involving allegations of Canadian financing subsidies on the exports of subway cars, when these same allegations became the subject of a countervailing duty investigation.²²²

A recent case illustrates the various considerations which may lead a United States industry to select Section 301 as the remedy to counteract subsidized imports into the United States. The case also shows the considerations which may prompt the Executive to pursue such a complaint under a typical import relief statute, rather than under Section 301.

2. The 1983 Specialty Steel Program

In December 1981, the United States specialty steel industry, together with the United Steelworkers of America, filed a complaint under Section 301, alleging that Austria, Belgium, Brazil, France, Italy, Sweden and the United Kingdom (all GATT contracting parties) subsidized their specialty steel industries.²²³ Several factors may have contributed to petitioner's choice of Section 301 over the countervailing duty law.

The industry may have had difficulties itemizing the various subsidies allegedly granted in different countries, allocating these subsidies to products being imported into the United States, and measuring their ef-

²¹⁹ 19 U.S.C. § 2411(a)(2)(B), *amended by* Trade and Tariff Act of 1984, § 304(a). In the past, however, the general view among United States policymakers has been that the "punishment should fit the crime," and that if the foreign unfair practice affects United States products, retaliation should also be in the product area. Coffield, *supra* note 142, at 395.

²²⁰ Section 301 explicitly provides that "(a)ction under this section may be taken on a nondiscriminatory basis or solely against the foreign country or instrumentality involved." 19 U.S.C. § 2411(a)(2)(A), *amended by* Trade and Tariff Act of 1984, § 304(a).

²²¹ Archibald, *supra* note 107, at VII-16.

²²² 47 Fed. Reg. 42,059 (1982). The USTR reasoned that, as a matter of policy, "redundant remedies and the waste of limited government resources" ought to be avoided. *Id.*

²²³ The USTR subsequently excluded Brazil from the 301-investigation. *See* 47 Fed. Reg. 10,107 and 35,387 (1982).

fects with any precision on the prices of specialty steel imported into the United States; an exercise demanded by the countervailing duty law.²²⁴ At that time, moreover, the industry could not be sure that the ITC, in measuring injury, would cumulate imports from all allegedly subsidizing countries. Because countervailing duty investigations are country-specific, there was a possibility that the ITC would not find injury with respect to imports from those countries which represented a relatively small percentage of total market penetration; or even that the ITC would not find injury with respect to any country taken individually.²²⁵

Interestingly, in drafting their Section 301 petition, complainants did not rely exclusively on the GATT Subsidies Code. They invoked the "unreasonableness" standard as well. One can appreciate the industry's approach, realizing that the boundary lines of countervailable domestic subsidization are largely uncharted, notwithstanding international efforts to draw these lines. That is not so much a problem of definition, as a function of fundamentally different socio-economic policies. GATT contracting parties have divergent perspectives as to how their individual economies ought to be structured. They do not share a common concept of the market economy (not even the relatively close-knit group of industrialized countries such as the United States, the European Community Member States, Japan and Canada), although the GATT's basic premise is to free market forces in international trade from government interference.²²⁶ Thus, government subsidization to help adjust ailing industries to changing market conditions is common in the Community, whereas many government representatives, industry officials and academics in the United States still view government subsidization suspiciously.²²⁷

²²⁴ Interestingly, in the ensuing months, the United States specialty steel industry also filed anti-dumping actions against imports of stainless steel from France, Germany and the United Kingdom, as well as a countervailing duty action against certain specialty steel imports from Spain. *Specialty Steel Industry Brings Action Against French Goods, Seeks Import Action*, INT'L TRADE REP. (U.S. Import Weekly) (BNA) No. 7, at A-160 (1982); *ITC Issues Affirmative Final Rulings on European Stainless Steel Products*, INT'L TRADE REP. (U.S. Import Weekly) (BNA) No. 8, at A-369 (1983).

²²⁵ Under the old law, the International Trade Commission (hereinafter referred to as "ITC") Commissioners each had discretion to cumulate. Section 612(a) of the Trade and Tariff Act of 1984 now requires that the ITC shall cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation, if these compete with each other, and with like products of the domestic industry in the United States market.

²²⁶ It is this premise which sets GATT apart from other international organizations dealing with international trade. See Wolf, *Tower of Babel: Conflicting Ideologies of Adjustment*, 2 WORLD ECON. 481 (1979).

²²⁷ Accordingly, "condemning" certain domestic subsidies as being countervailable is a delicate exercise in GATT. While the Subsidies Code accepts that domestic subsidies, in general, are legitimate unless they are found to injure foreign competitors, the Trade Agreements Act of 1979 condemns a number of domestic subsidies without qualification. Compare Subsidies Code, art. 11 with 19 U.S.C. § 1677(a)(5)(B) (1982). This discrepancy already led to a bitter dispute between the Euro-

a. *The risks of Section 301*

In view of the ongoing debate in GATT and other international fora, such as the OECD, on the elusive demarcation between permissible and countervailable subsidization, the specialty steel complaint did not put the Executive in a very comfortable position. The United States government would have been hard-pressed to persuade its co-signatories that the disputed subsidies violated the Subsidies Code.²²⁸ Unlike export subsidization, the Code does not contain a straightforward prohibition on many of the subsidies in issue here, such as preferential loans, "recapitalization" of financial losses, tax exemptions etc.²²⁹ The Code's signatories merely agreed that they would "seek to avoid" injury to each other's industries by granting these types of domestic subsidies to their national industry.²³⁰

Accordingly, there was a risk that the Code signatories would not favorably receive United States actions on behalf of the specialty steel industry. Moreover, a formal determination of the Code signatories that the disputed subsidy programs were not inconsistent with Code obligations of the exporting countries could have created additional problems for the United States government extending beyond the specialty steel case. Although this interpretation has not gone unchallenged, one school of thought holds that any multilateral determination of Code commitments is also binding on the signatories with respect to subsequent unilateral countervailing duty investigations.²³¹ In this view, a determination

pean Community and the United States, following the barrage of countervailing duty actions brought by the United States steel industry in 1981 against carbon steel imports from European Community Member States and a number of other countries. See Dominick, *Countervailing State Aids to Steel: A Case for International Consensus*, 21 COMMON MKT. L. REV. 355 (1984); Barshefsky, Mattice & Martin, *Government Equity Participation in State-Owned Enterprises: An Analysis of the Carbon Steel Countervailing Duty Cases*, 14 LAW & POL'Y INT'L BUS. 1101 (1983).

²²⁸ Because the specialty steel industry did not rely on the countervailing duty statute to attack the foreign "subsidy" programs, GATT rules required that the United States seek a multilateral consensus on the prohibition of the foreign subsidies (often referred to as "track 2" of the Subsidies Code). Interestingly, GATT rules did allow the executive to reach a unilateral determination on the counteravailability of similar subsidy programs in the carbon steel cases, since they were brought under the countervailing duty statute (often referred to as "track 1" of the Subsidies Code). Compare Subsidies Code, arts. 1 and 2 ("track 1") with Subsidies Code, arts. 12 and 13 ("track 2"). Whether the substance of a unilateral determination conforms with GATT norms is, of course, a different question. See also *infra* text accompanying note 231.

²²⁹ Compare Subsidies Code, arts. 9 and 10 (export subsidies) with Subsidies Code, art. 11 (other subsidies). The domestic "subsidies" which were attacked in the 301 petition are summarized in 47 Fed. Reg. 51,717 (1982).

²³⁰ Subsidies Code, art. 11.2.

²³¹ In other words, determination made in "track 2" procedures would apply throughout the Code; that is the same for "track 2" procedures. See generally Benyon & Bourgeois, *supra* note 175, at 327.

of the Code signatories in the specialty steel case, that the disputed subsidy programs did not violate the Subsidies Code, would have preempted the United States on subsequent occasions to unilaterally impose countervailing duties on imports benefiting from similar subsidies.

Given the risks of taking the specialty steel case to GATT, the Executive's alternative under Section 301 would have been to unilaterally condemn the foreign subsidy programs as being unfair (*i.e.*, "unreasonable") and retaliate. This course of action would have entailed the danger of a head-on collision with many United States trading partners, threatening the fragile consensus reached in the Subsidies Code. Following a nearly year-long investigation by the USTR, President Reagan in a remarkable decision sought to minimize international uproar while appeasing the domestic industry at the same time.

b. The switch to the escape clause

The President adopted the USTR's recommendation to suspend the Section 301 proceedings, while requesting the ITC to conduct an expedited escape clause investigation.²³² He reasoned that the actions brought by the specialty steel industry under Section 301, as well as under the countervailing and antidumping duty statute, did not cover all important, or potentially important, sources of specialty steel imports. Furthermore, he argued that:

dealing with the specific subsidy problem itself probably would not have a great impact on the world steel trading environment in which our industry must compete. Subsidies are only one of a wide range of trade restrictive and trade distortive practices that many of our trading partners engage in to protect their industries and to stimulate exports. If we are ever to put an end to constant trade disputes in steel, we must stop dealing with discrete import and export issues in isolation and instead begin a coordinated approach to the problem. By combining the Section 201 and Section 301 approaches, the United States hopes to stabilize the immediate import situation and to reverse the global trend toward greater excess capacity, increased subsidization, and closed markets.²³³

Subsequently the ITC did indeed determine that imports of certain specialty steel products injured United States producers, and recommended that the President grant relief to the domestic industry. On July 5, 1983, President Reagan announced a comprehensive import relief program for the specialty steel industry,²³⁴ which consisted of tariff increases on some products, and quotas on others (should the exporting countries

²³² 47 Fed. Reg. 51,717 (1982). The Section 301 proceeding was suspended in order to enable the President to take emergency protective measures if need be during the escape clause proceedings. *Id.*

²³³ *Id.* at 51,718.

²³⁴ 48 Fed. Reg. 31,177 (1983).

of these products not agree to voluntarily reduce their exports to the United States²³⁵).

A detailed critique of this decision falls beyond the scope of this article, though the President's reasoning certainly invites criticism. One might query, for example, how the United States government envisaged reversing the global trend toward closed markets by imposing import restrictions itself.²³⁶ What is interesting for our discussion is that even though the President explicitly agreed with petitioner's contention that the disputed foreign subsidy practices were inconsistent with provisions of the Subsidies Code, the Executive chose not to handle the specialty steel industry's complaint through direct confrontation with United States trading partners. Confrontation would have resulted from imposing import restrictions as a unilateral *retaliatory* measure under Section 301.²³⁷ Instead, the United States government fell back on a classic trade remedy—the escape clause—an action which, though disagreeable to its trading partners, certainly was not as controversial as retaliation under Section 301 would have been.²³⁸

In hindsight, one wonders why the industry did not invoke the escape clause from the beginning. There may have been legal obstacles.²³⁹ Perhaps post-election rhetoric, that the laissez-faire attitude of the Rea-

²³⁵ The European Community, which refused to voluntarily reduce specialty steel exports to the United States, was then faced with unilateral United States import restrictions, and ultimately retaliated against the United States under GATT, art. XIX by increasing tariffs on some and imposing quantitative restrictions on other United States imports. See 27 O.J. EUR. COMM. (No. L 40) 1 (1984). The Commission gave an account of the Community's dispute with the United States in its answer to Parliamentary question no. 1799/83, 27 O.J. EUR. COMM. (No. C 141) 27 (1984).

²³⁶ Aarts, *Beperkende Maatregelen op het Gebied van Japan, Textiel en Staal*, in EEG-HANDELSPOLITIEK EN BESCHERMENDE MAATREGELEN TEGEN DE INVOER UIT DERDE LANDEN 27 (1984). The timing of the specialty steel program was awkward as well, coming barely a month after the Williamsburg summit, where seven Heads of State of major industrial countries (including President Reagan) resolved to stand firm against protectionist pressures. 5-1983 EUR. COMM. BULL. §§ 3.4.1-3.4.3. For criticism in the United States, see Boyer, *Protectionism, Reagan-Style: The Steel Quotas*, *FORTUNE*, at 55 (Aug. 8, 1983).

²³⁷ 48 Fed. Reg. 31,177 (1983).

²³⁸ In the general uproar that followed the announcements of the steel program, this nuance may have been lost on EEC observers. Thus, a ranking Commission official recently maintained, in denouncing the President's actions, that the program's import relief measures were based on Section 301. Aarts, *supra* note 236, at 27 and 39.

²³⁹ Only in February 1980, less than two years before the specialty steel industry filed its complaint with the USTR under Section 301, did President Carter terminate restrictions on specialty steel imports, which were granted as escape clause relief to the United States industry pursuant to Section 201 in 1976. *USTR Recommends Section 201 Study of Specialty Steel Industry by ITC*, *INT'L TRADE REP. (U.S. Import Weekly) (BNA)* No. 7, at A-107, 108 (1982). The ITC will not initiate a 201-investigation regarding a product which has already received import relief pursuant to the escape clause, unless two years have lapsed since the last day on which such import relief was granted. 19 U.S.C. § 2253(j) (1982).

gan Administration would discourage use of the escape clause (implying restrictions on fair trade), also deterred the specialty steel industry.²⁴⁰ Be that as it may, the resolution of this complaint does suggest that the Executive is reluctant to take offensive action against GATT contracting parties in order to protect the United States domestic market, if traditional—defensive—remedies are available to petitioners.

III. EEC COMPLAINT PROCEDURE EMBODIED IN THE NEW TRADE POLICY INSTRUMENT

When considering trade policy measures from an EEC perspective, one should keep in mind that the Community institutions have had exclusive authority in commercial policy since January 1, 1970.²⁴¹ Accordingly, the Member States no longer have the power to take trade measures individually, at least not without Community authorization.²⁴² Thus, if a Dutch industry feels aggrieved by a foreign trade practice and approaches the Dutch government, the latter may take up these grievances informally with the foreign government concerned, but it cannot bring this matter before the GATT nor can it impose national trade restrictions. Instead, the Netherlands would have to appeal to the Community institutions in Brussels, requesting the Community to initiate appropriate dispute settlement proceedings and, eventually, to take retaliatory action.²⁴³

Initially, the European Community was rather hostile towards the Section 301 procedure. Doubts were raised in European circles whether the United States Executive would be more inclined to deviate from

²⁴⁰ See deKieffer, *Status of Import Relief Under Section 301, 103 and 201 and 406*, in THE TRADE AGREEMENTS ACT OF 1979—FOUR YEARS LATER 391, 403-04 (Practicing Law Inst. No. 425 1983).

²⁴¹ The European Court of Justice derived the exclusiveness of the Community's competence in international trade policy as of Jan. 1, 1970 from EEC Treaty, art. 113. *Donckerwolke v. Procureur de La République*, 1976 Eur. Comm. Ct. J. Rep. 1921 (recital 32). For a recent analysis, see Bourgeois, *The Common Commercial Policy—Scope and Nature of the Powers in PROTECTIONISM AND THE EUROPEAN COMMUNITY 1* (Völker ed. 1983).

²⁴² Because the Community's common commercial policy is not fully developed yet, there are still instances where Member States can maintain or impose national trade measures in accordance with Community law (*i.e.*, subject to Community authorization). In practice, though, it is not always easy to distinguish between lawful and unlawful national measures affecting international trade. This is aptly illustrated by the intricate relationship of the Community (and the Member States) with Japan. See generally Bronckers, *supra* note 24.

²⁴³ On the Community's capacity to press international claims, including claims on behalf of Community citizens, see Stein, *Towards a European Foreign Policy?—European Foreign Affairs Systems from the Perspective of the United States Constitution* in METHODS, TOOLS AND POTENTIAL FOR EUROPEAN LEGAL INTEGRATION IN THE LIGHT OF THE AMERICAN FEDERAL EXPERIENCE 235-38 (Cappelletti ed. 1985).

GATT rules now that Congress had explicitly authorized the Executive to ignore them. From a procedural point of view, the Community was suspicious of the more active role Section 301 created for private complainants in supervising the observance of intergovernmental commitments. Many feared that the United States Executive's discretion in resolving international trade disputes pursuant to Section 301 would be restricted similar to that in United States countervailing duty and antidumping law. These suspicions parallel the widely-held view in the Community that private litigation can easily disrupt international trade relations. International norms, it is often argued in the EEC, are designed to guide consultations among the public authorities by delineating governmental responsibilities.²⁴⁴

Contrasts in legal culture may explain the divergent attitudes in Europe and the United States.²⁴⁵ This is illustrated by the differences between Community and United States antidumping and countervailing duty law. In the EEC, the administering authority will consider, besides price discrimination or subsidization which allegedly causes significant injury to a private petitioner, whether an antidumping or countervailing duty levy on underpriced imports would not only be in the petitioner's interest, but in the interest of the Community as well.²⁴⁶ Such a condition, which gives the administrators of the antidumping and countervailing duty law wide discretionary powers, is unknown in United States law.²⁴⁷

Still, the EEC Council finally adopted a new trade policy instrument in September of 1984, which established a procedure for private petitioners to complain of foreign unfair trade practices.²⁴⁸ Although the procedure was modelled after Section 301, there are important distinctions between Section 301 and the new EEC instrument.

For one thing, the EEC instrument does not reflect the shift in em-

²⁴⁴ See J. STEENBERGEN, G. DE CLERQ & R. FOQUÉ, *CHANGE AND ADJUSTMENT—EXTERNAL RELATIONS AND INDUSTRIAL POLICY OF THE EUROPEAN COMMUNITY* 13-14 (1983); Kuypers, *Some Reflections on the Legal Position of the Private Complainant in Various Procedures Relating to Commercial Policy*, 9 *LEGAL ISSUES OF EUR. INTEGRATION* 115, 125 (1983) ("In no case should the Commission or the Council be brought in a position where it has to take substantive action on the international level because private complainants can legally force the Commission or the Council to do so").

²⁴⁵ *Id.* at 149.

²⁴⁶ J. STEENBERGEN, G. DE CLERQ & R. FOQUÉ, *supra* note 244. See also 27 O.J. EUR. COMM. (No. L 201) 1 (1984) (Reg 2176/84, art. 12(1)).

²⁴⁷ See 19 U.S.C. § 1673 (1982) (antidumping law) and 19 U.S.C. § 1671 (1984) (countervailing duty law). The Executive's lack of discretion in administering these statutes has not remained without criticism in the United States. See generally Ehrenhaft, *supra* note 211.

²⁴⁸ 27 O.J. EUR. COMM. (No. L 252) 1 (1984) (Reg. 2641/84).

phasis from inward-looking protective measures to export promotion, which has come to be identified with Section 301. Regulation 2641/84 primarily seeks to protect the Common Market against foreign unfair trade practices. Securing access to export markets for Community industries clearly has been a secondary objective in drafting the regulation. In addition, the drafters of the instrument's procedure were more concerned with internal decision-making processes (*i.e.*, the Commission's struggle with the Council for independent authority in the trade policy area), than with the position of private complainants. Indeed, government authorities in the EEC do not rely as much on the business community for the enforcement of intergovernmental commitments as does the United States Congress.

This chapter of the article first traces the drafting history of the new EEC instrument. The first subchapter will draw particular attention to the target of the new instrument—its definition of unfair trade practices—and its linkage to a number of measures designed to liberalize intra-community trade. The second subchapter will discuss the Commission's move to assert decision-making authority in trade policy matters via the new instrument. In the final analysis, the Commission only gained a partial, though notable, victory over the Council. The third subchapter addresses the instrument's procedure from the perspective of a private complainant.

A. Drafting History of the New Instrument

In tracing the drafting history of the Community's new trade policy instrument, one can point to a number of mileposts. The influential Welsh report led the European Parliament at the end of 1981 to adopt a resolution, which invited the Commission to extend its protection of Community industry against foreign unfair trade practices beyond antidumping and countervailing duty measures. France took up this theme, but the Commission's first response was more reserved. Then, in early 1983, the Commission made an about-face and released its proposal for a new trade policy instrument. The proposal proved to be controversial. Three Member States vehemently opposed adoption of the instrument in anticipation of a rash of protectionist actions by the Community. The Council as a whole found the decision-making mechanism proposed by the Commission (commonly referred to as "the guillotine") difficult to accept. Finally, after deliberating for more than a year, the Council agreed in principle on a modified version of the instrument in April of 1984. Due to the fact that the instrument was part of a package deal, it

took close to another six months before the instrument entered into force.

1. The Welsh Report

The call for a new trade policy instrument sounded clearly for the first time in 1980. In June of that year, the Committee on External Economic Relations of the European Parliament held hearings on the Community's antidumping activities. During these hearings, which not only touched upon the Community's antidumping policy, the Committee's rapporteur Mr. Welsh questioned the viability of GATT norms at a time of economic recession:

The GATT is a series of agreements which was developed in the post-war years when the world was going through a period of unparalleled trade expansion and the entire thrust of the GATT is geared to take care of a period when trade is expanding very fast and it is to try, I suppose, in a sense to act as a referee in a football match to stop the attack of one side committing too many fouls and scoring an awful lot of goals. In other words, it is a system that is geared to attack. Unfortunately, for all sorts of reasons, the world is now going through some sort of trade recession. Certainly the growth rates that we have now, in Western Europe and I think in the United States, simply cannot be compared with what was going on before. So, in a sense, *trade as opposed to being an offensive matter, has now become a defensive matter* and in applying GATT and antidumping to those new circumstances; what are we doing? *We are actually using an offensive code for a defensive set of circumstances* and it may be that some of the problems and some of the twists and turns we get into are simply a result of that. In a sense the rules have not changed quite as fast as the situation has. (emphasis supplied).²⁴⁹

The wisdom of this observation is debatable, if only because the GATT itself was negotiated in response to the "beggar thy neighbour" policies prevailing during the depression era of the 1930s. Time and again, the GATT contracting parties have reaffirmed their belief that protectionist measures aggravate the effects of an economic down-turn. Thus, the 1982 Ministerial Declaration resolved to create a "renewed consensus" in support of the GATT system so as to restore confidence in the liberalization and expansion of world trade.²⁵⁰ Yet the statement quoted above does reflect commonly held views in the Community (and, one should add in all fairness, elsewhere).

Following these proceedings, Mr. Welsh was asked to draw up a

²⁴⁹ Parliamentary Comm. on External Economic Relations, Report of the Proceedings in Public Concerning the Community's Anti-dumping Activities 68-69 (P.E. 67.730 1980) (these proceedings are annexed to 1981-1982 EUR. PARL. DOC. (No. 422) 1 (1981)).

²⁵⁰ GATT, 29th Supp. BISD 9, 10 (1983).

report on the Community's antidumping activities. In the report, Mr. Welsh argued that antidumping measures are inadequate to protect Community industry from the consequences of unfair trade, a concept which in his view "is quite foreign to GATT".²⁵¹ This statement clearly is ill-founded.

Through the GATT's dispute settlement mechanism, the contracting parties can complain of any practice which they consider unfair by alleging nullification or impairment of the benefits they expect from GATT. As was shown above, the concept of "unfairness" in GATT is very broad and extends beyond violations of explicit commitments.²⁵² What Mr. Welsh probably objected to is that the GATT has only singled out two kinds of unfair trade practices against which the contracting parties may retaliate unilaterally: dumping and subsidization. In all other cases, unfairness first must be established by the GATT membership before a complaining party will be authorized to retaliate. For good reasons, the GATT membership as a whole rarely authorizes retaliatory measures. Instead, GATT individual members tend to rely on the normative force of a multilateral ruling that a certain practice is indeed unfair, and expect the party concerned to eliminate this practice on its own motion. This process can be time-consuming, but proves to be effective in many cases. The only alternative currently conceivable, a vicious circle of unilateral protectionist and retaliatory restrictions, certainly is not preferable.

Mr. Welsh went on to propose that the "Commission's Commercial Defence Service" should cover all aspects of unfair trading practices and should not confine itself to breaches of GATT codes.²⁵³ Mr. Welsh's proposal reminds one of the Congressional canon in Section 301 that the Executive is not bound by GATT norms.²⁵⁴ Both the United States Congress as well as the European Parliament do not feel constrained by GATT rules when it comes to deciding on the unfairness of foreign actions it seems. Unilateral determinations of unfairness suffice in their view. The difference is that Mr. Welsh's Committee was more concerned with the effects of foreign unfair trade practices on the Community's domestic market, whereas Congress focused on foreign barriers restricting United States exports.

In its subsequent resolution on the Community's antidumping activities, the European Parliament inserted two paragraphs on "commercial

²⁵¹ 1981-1982 EUR. PARL. DOC. (No. 422) 16 (1981).

²⁵² See *supra* text accompanying note 40.

²⁵³ 1981-1982 EUR. PARL. DOC. (No. 422) 17 (1981).

²⁵⁴ See *supra* text accompanying note 40.

defense". Apart from admonishing the Commission not to confine its defensive activities to dumping and subsidization, it recommended that the Division of the Commission which administers the Community's trade policy instruments should be specifically charged with the responsibility of advising complainants who cannot establish dumping practices and to assist them by whatever means might be appropriate.²⁵⁵

2. The French Memorandum

On April 27, 1982, France submitted a memorandum on the reinforcement of the Community's trade policy instruments to the other EEC Member States and the Commission. This memorandum specified earlier French proposals for a "*relance européenne*" in the context of the common commercial policy.²⁵⁶ France sought to develop an external complement for the "reconquest" of the Community's internal market. In its view, on the one hand the Community should fine-tune statistical surveillance of imported products, while on the other hand the Community ought to respond more effectively to foreign unfair trade practices.

The French government explicitly referred to Section 301, which it considered useful to condemn unfair trade practices escaping the GATT regime. Because its memorandum did not define such practices, some observers feared that France attempted to introduce protectionist elements in the Community's trade policy machinery. France's disposition to protect the Common Market against foreign competition fuelled these suspicions.²⁵⁷ Admittedly though, the memorandum did point to foreign practices restricting Community exports as well.

When the European Council convened in Brussels in June of 1982, the Heads of State appeared to echo the French concerns. The Council considered that it was of the highest importance to defend vigorously the legitimate trading interests of the Community. To this end, the Council believed that the Community should act "with as much speed and efficiency as its trading partners."²⁵⁸

The Commission, however, in its first reaction to the French memo-

²⁵⁵ See § 14 of the Resolution adopted on Dec. 16, 1981, 25 O.J. EUR. COMM. (No. C 11) 37 (1982).

²⁵⁶ See generally *Het Franse Memorandum over de Gemeenschappelijke Handelspolitiek*, 25 EUROMARKT-NIEUWS 146-48 (1982).

²⁵⁷ See *Frankrijk dringt bij EEG aan op scherpere invoercontrole*, *Financieele Dagblad*, Apr. 17-19, 1982, at 5 (attributing the French proposals to increasing concern over Japanese and United States imports interfering with efforts of the French government to stimulate domestic industry).

²⁵⁸ 6-1982 EUR. COMM. BULL. § 1.5.2. Note that the European Council is an organ that is not mentioned as such by the Community's treaties, and could be distinguished from the Council of Ministers which is mentioned in the treaties. See generally Lauwaars, *The European Council*, 14 COMMON MKT. L. REV. 25 (1977).

randum deemed a new trade policy instrument redundant. It argued that the Member States could already bring complaints about foreign trade actions to the Community institutions. As far as the effectiveness of the Community's trade policy machinery was concerned, a procedure similar to United States Section 301 would not add anything to Community powers with respect to antidumping, escape clause actions or retaliation according to the Commission. If anything, the Council's decision-making process should be improved (generally speaking, the Council sets policy guidelines and takes final decisions on international trade matters, whereas the Commission is in charge of their implementation). Significantly, the Commission did not venture to give an opinion on the desirability of a private complaint procedure in the EEC, though it underscored this aspect in discussing Section 301.²⁵⁹

France was not satisfied with this lukewarm response. Without consulting the Community authorities, it established an advisory committee on international trade in August of 1982. The committee was charged with investigating whether abnormal imports threatened to injure the national economy. Private parties could appear before this committee and request an investigation.²⁶⁰ In its response to a Parliamentary question, the Commission was careful to point out that the advice of this committee would be restricted to conditions on the French market, and in no way could prejudice the outcome of appropriate Community investigations.²⁶¹ Not much was heard from the French advisory committee since then.

The declaration issued by the European Council at its meeting in Copenhagen in December of 1982 did not specifically address Community action against foreign unfair trade practices.²⁶² The Council appeared more concerned with the remaining barriers to intra-community trade. In this connection, the question whether and how products originating in foreign countries should be certified for free movement within the Common Market became a stumbling block for proposals to eliminate technical barriers to intra-community trade.²⁶³ Some Member

²⁵⁹ See generally *Het Franse memorandum over de Gemeenschappelijke handelspolitiek; de eerste rectie van de Commissie*, 25 EUROMARKT-NIEUWS 204 (1982).

²⁶⁰ *Id.* at 206-07.

²⁶¹ Response to Parliamentary question no. 1469/82, 26 O.J. EUR. COMM. (No. C 80) 6 (1983).

²⁶² 12-1982 EUR. COMM. BULL. § 1.2.2 *et seq.* The press did report though, that the participants in the Council's meeting were most concerned about the rising tide of imports into the Community and considered negotiating a variety of VRAs, notably with the United States and Japan, to stem the inflow of foreign products (particularly high-technology products). *EEC leaders seek trade pacts aimed at cutting unemployment*, Financial Times (London), Dec. 4, 1982, at 1.

²⁶³ See paragraph 4 of the Commission memorandum to the Council on "re-activating the European internal market," which it submitted in preparation of the Copenhagen meeting. EUR. COMM.

States were concerned, for example, that uniform type-approval procedures with respect to the importation of cars into the Community could easily undermine national restrictive measures on Japanese car imports.²⁶⁴ According to such uniform procedures, Japanese cars, which for instance Dutch customs officials certified for entry into the Community, could be transported and sold in other Member States as EEC products.²⁶⁵

Then, in February of 1983, the Commission surprised outsiders by submitting a draft regulation to the Council of Ministers for the creation of a new trade policy instrument.²⁶⁶

3. The Commission Proposal

In presenting its proposal to the Council, the Commission sought to distance itself from United States Section 301. It objected in particular to the broad definition of unfair trade practices in the latter, in particular

COMM. (82) 735 final (1982). The Commission submitted a draft directive to the Council concerning "EEC certification" of industrial products originating in third countries in 1980. 23 O.J. EUR. COMM. (No. C 54) 5 (1980).

²⁶⁴ See generally Bronckers, *supra* note 24 (discussing the legality of these national restrictions under Community law).

²⁶⁵ See EEC Treaty, art. 10. For Example, France would have to accord the same treatment to cars imported from Japan as to cars imported from Germany. Yet one should be careful to distinguish between the certification of third country products for entry into the Community and the internal harmonization of technical standards. Article 10 of the EEC Treaty may not apply to the latter. To express this differently, agreement among Member States that type-approval in one Member State will be valid throughout the Community does not necessarily imply that a third country product which meets this type-approval standard is entitled to entry and free circulation within the Community. GATT law exempts from the MFN-principle intra-community trade concessions granted by Member States to each other's products. See GATT, art. XXIV.

However, this distinction between third country certification and internal harmonization is suspect. If a third country product meets the applicable Community standard, the refusal to grant this product EEC type-approval easily leads to the presumption of a disguised restriction on trade. As such, this refusal would be inconsistent with the Standards Code. See Standards Code, arts. 5 and 7. Therefore, third country certification and internal harmonization of technical standards would seem to be linked. Nevertheless, some Community Member States persist in making the distinction. They refer, for example, to the implicit reciprocal character of the Code's obligations. See Standards Code, art. 15(6). Thus, they would not grant Code treatment to countries (including GATT Contracting Parties) who have not acceded to the Code. See Decision 80/45/EEC, art. 3, *supra* note 1 (providing for restrictive interpretations of Code norms in case of non-reciprocity).

Should a Japanese car (or another third country product) receive EEC-certification upon importation in one Member State, as a rule, it could be freely exported to other Member States in accordance with the EEC Treaty's principle of free movement of goods with the Community. EEC Treaty, arts. 30-36. Any one of these other Member States might still try to block intra-Community traffic of third country products, however, by requesting the Commission to authorize exceptions to the free movement principle pursuant to EEC treaty, art. 115 (appealing to differences in international trade policy measures which still exist because the EEC's common commercial policy is not fully uniform yet). See generally Bronckers, *supra* note 24, at 71-74.

²⁶⁶ The text of the Commission proposal is published in 26 O.J. EUR. COMM. (No. C 83) 6 (1983).

the "unreasonableness" criterion of Section 301.²⁶⁷

Given its awareness of the defects of the approach adopted by some of the Community's partners, the Commission felt that a clear definition was required of the "unfair" practices against which it seeks powers to act. It took as a starting point the concept that, in order to be described as "unfair", a practice must either be incompatible with the commitments of the nonmember country concerned vis-à-vis the Community or, more generally, be condemned by international law or the rules regarding commercial policy commonly accepted by the Community's principal partners.²⁶⁸

As examples of the practices covered by its definition of unfairness, the Commission cited export restrictions contrary to the GATT, or import restrictions incompatible with the GATT.²⁶⁹ Yet the reference to practices which were deemed incompatible with trade policy rules "commonly accepted by the Community's principal partners" raised doubts as to whether the Commission did intend to stay within the GATT framework.²⁷⁰ The Commission failed to allay these concerns by omitting examples of practices falling into this class of unfairness. Nor did the Commission indicate whether it would admit complaints about foreign restrictions on EEC services or investments.

A number of Member States (notably Denmark, Germany and the Netherlands) did not take kindly to the new instrument proposed by the Commission. They associated the new instrument with French insistence on broad-ranging protection of the Common Market against allegedly unfair imports.²⁷¹ Indeed, despite its balanced explanatory statement which also focused on foreign restrictions affecting EEC exports, the Commission drafted the instrument along the lines of the Community's antidumping and countervailing duty regulation. Thus, the structure of the instrument revealed that the Commission was most concerned with defensive measures.²⁷²

Right from the start, during its Brussels meeting in March 1983, the European Council established a link between measures designed to strengthen the internal market and adoption of the new trade policy instrument.²⁷³ France in particular let it be known that it would not approve of a package of outstanding directives liberalizing intra-community

²⁶⁷ See *supra* text accompanying notes 47-50.

²⁶⁸ EUR. COMM. COM. (83) 87 def., at 2 (1983). See also art. 2(2) of the Commission proposal, *supra* note 266.

²⁶⁹ EUR. COMM. COM. (83) 87 def., at 2 (1983).

²⁷⁰ *Het Commissie-voorstel voor een nieuw handelspolitiek instrument*, 26 EUROMARKT-NIEUWS 82, 84 (1983).

²⁷¹ Agence Europe, Apr. 5-6, 1983, at 1.

²⁷² See *infra* text accompanying note 339.

²⁷³ Agence Europe, Mar. 23, 1983, at 5.

trade (including the issuance of "EEC-certificates" to products originating in non-member countries), if the new instrument would not be adopted at the same time. Thus, France seemed to play its cards well, in that one might have expected the liberal traders in the Community (e.g., the Dutch) to give up resistance to the new instrument in exchange for better trading opportunities within the Community (seventy percent of Dutch exports are sold in the Common Market²⁷⁴).

The linkage between the new instrument and the re-enforcement of the Community's internal market did not remain uncontested. In a resolution welcoming the Commission draft, the European Parliament criticized this linkage. It stressed that the measures needed to strengthen the EEC's internal market should not be linked with the adoption of the proposed regulation.²⁷⁵ Interestingly, the Parliament opined that the new instrument ought to apply to services as well.²⁷⁶

Criticisms notwithstanding, the connection between instrument and internal market became a fixture of the ensuing negotiations. Finally, on April 9, 1984, the Council adopted the trade policy instrument in principle. Yet its linkage with intra-Community measures gave an unexpected twist to the instrument's entry into force.

4. Adoption and Aftermath

Although the Council changed the definition of "unfairness", it did little to clarify the scope of the instrument. The relevant text now reads:

For the purposes of this Regulation, illicit commercial practices shall be any international trade practices attributable to third countries which are incompatible with international law or with the *generally accepted rules* (emphasis supplied).²⁷⁷

First, it is difficult to see in what respect "the generally accepted rules" differ from international law. Suppose "the generally accepted rules" refer to unwritten rules accepted by all trading nations. If unwrit-

²⁷⁴ EEG-HANDELSPOLITIEK EN BESCHERMENDE MAATREGELEN TEGEN DE INVOER UIT DERDE LANDEN 35 (Gosses' contribution to discussion) (1984). In this connection, one should recognize that a variety of national standards (e.g., safety and health regulations) are exempted from the ban on intra-Community trade restrictions in EEC Treaty, art. 36. In order to harmonize these standards, the Council may issue directives pursuant to EEC Treaty, arts. 100 and 235. Directives are instructions to the Member States to amend their laws within a certain time period. They are binding as to the result to be achieved, but leave the authorities the choice of form and method. EEC Treaty, art. 189.

²⁷⁵ See § 6 of the resolution, reprinted in 26 O.J. EUR. COMM. (No. C 205) 9 (1983).

²⁷⁶ *Id.* at § 4.

²⁷⁷ 27 O.J. EUR. COMM. (No. 1 252) 2 (1984) (Reg. 2641/84, art. 2(1)). On this notion of "generally accepted rules," see also Bourgeois & Laurent, *Le "Nouvel Instrument de Politique Commerciale": Un Pas en Avant Vers L'élimination des Obstacles aux Echanges Internationaux*, 21 REVUE TRIMESTRIELLE DE DROIT EUROPEEN 41, 52-54 (1985).

ten rules are generally accepted, however, they can become part of customary international law and the extension suggested by the Council's text disappears.²⁷⁸ If, on the other hand, the rules alluded to by the Council, in written or unwritten form, do not have to be accepted by all trading nations, then it becomes difficult to discern a meaningful distinction between the language drafted by the Commission—"rules regarding commercial policy commonly accepted by the Community's principal partners" and the Council's formula. Apparently, the objective of both clauses is to apply, if necessary, the fair-trading principles contained in GATT and other international agreements to countries who are not party to these agreements (e.g., most Communist countries). That, however, may amount to a violation of the generally accepted rule *pacta tertiis nec nocent, nec prosunt* (those who are not party to an agreement cannot be bound by its provisions).

There is one important difference, however, between Section 301 and the new EEC instrument. Congress authorized the President to disregard international (GATT) commitments in taking retaliatory action.²⁷⁹ In contrast, both the Commission draft as well as the regulation adopted by the Council specify that any trade policy measure taken in response to unfair foreign trade practices shall be compatible with "existing international obligations and procedures."²⁸⁰

Nevertheless, the scope of the new instrument will remain somewhat obscure until it has been actually applied or until the Commission has received authority from the Council to issue implementing regulations. Records of the Council's deliberations are not made public, nor does the Council publish explanatory statements accompanying the regulations it adopts. What is clear, however, is that the instrument has maintained a strong bent towards defensive action—protecting the Common Market against what is considered to be unfair import competition.²⁸¹ Furthermore, it appears that the Council did not intend to cover foreign prac-

²⁷⁸ See generally G. VAN HOOF, *RETHINKING THE SOURCES OF INTERNATIONAL LAW* 85-116 (1983) (tracing different phases in the creation of customary international law).

²⁷⁹ See *supra* text accompanying note 47.

²⁸⁰ See art. 11(2) of the Commission proposal, *supra* note 266; 27 O.J. EUR. COMM. (No. L 252) 5 (1984) (Reg. 2641/84, art. 10(3)). The Regulation adopted by the Council clarifies that the Community will resort to conciliation or dispute settlement procedures, if international commitments so required, before considering retaliatory action. Such action in itself should conform to the outcome of international consultations or proceedings. The Council thus followed the recommendations of the advisory Economic and Social Committee. 26 O.J. EUR. COMM. (No. C 211) 26 (1983).

²⁸¹ E.g., *Brussel mag harder optreden tegen oneerlijke concurrentie*, *Financieel Dagblad*, Apr. 11, 1984, at 5.

tices affecting EEC services and investments.²⁸²

As mentioned above, in April of 1984 the Council only adopted the new instrument in principle. The instrument's fate was still coupled, though inversely, with the fortunes of fifteen directives on technical barriers to intra-community trade. Having secured approval of the instrument, some Member States (notably France) removed the political blockage on Community-wide harmonization of standards relating to such products as gas cylinders, electrically operated lifts, building equipment and lawn mowers (automotive products were not included in this package of fifteen directives, nor was the proposed directive regarding "EEC certification" of third country products).²⁸³ The linkage strategy, however, now worked against the instrument's entry into force, at the instigation of Germany in particular.

The three liberal Member States could be expected to favorably consider the more encompassing trade-off which was originally envisaged. This trade-off involved accepting the instrument in return for far-reaching harmonization of EEC standards, and for consensus on uniform certification of foreign country products. Yet the limited exchange ultimately proposed by France and other member states agreeing with France's position seemed hardly worth the price. The fifteen directives, which in the end had been attached to the instrument, were relatively insignificant. What happened next is interesting.

Denmark expressed reservations on a number of the fifteen directives. It objected, for instance, to harmonization of standards applicable to construction site equipment for reasons related to the noise levels produced by these products.²⁸⁴ The arguments Denmark raised were not without merit, but they were of such a technical nature that it seemed incongruous to hold off adoption of the other directives, and the trade policy instrument for that matter. Germany, however, strongly opposed splitting up the package.²⁸⁵ The Council yielded to this opposition, which delayed the instrument's entry into force until September 22, 1984.²⁸⁶

²⁸² This can be inferred from the definition of the "Community industry" which may invoke the new instrument. See *infra* text accompanying note 327.

²⁸³ Agence Europe, May 8, 1984, at 7.

²⁸⁴ The way the EEC directives on the maximum noise level of the products were construed (by measuring the noise produced by the machines), left open the possibility that Danish noise limits, which are measured in the workplace, would be exceeded by these machines. Yet, if the machines would originate in EEC Member States and would comply with newly harmonized noise standards, they should be freely imported into Denmark without any adaptation for usage. Agence Europe, July 18, 1984, at 9.

²⁸⁵ Agence Europe, May 16, 1984, at 6; Agence Europe, July 18, 1984, at 9. (Italy and Holland apparently also favored a comprehensive agreement at some point.)

²⁸⁶ Reg. 2641/84 was adopted by the Council on Sept. 17, 1984, when Denmark lifted its block

5. Summary

Reviewing the drafting history of the new trade policy instrument, it appears that the Community has not succumbed to pressures which would have moved the Common Market outside the GATT framework. Despite strong sentiments expressed in the Welsh report that GATT norms have not kept up with changing economic circumstances, Regulation 2641/84 subjects any Community measure directed against foreign unfair trade practices to international (GATT) commitments and procedures.

Yet it is too early to gauge the impact of the new instrument on the Community's trade policy, given the ambiguous definition of "unfairness", particularly the interpretation of "the generally accepted rules". The French origin and subsequent discussions do suggest that the instrument's primary use is thought to be the protection of the Common Market, rather than the promotion of EEC exports. As this article will demonstrate below, the procedure set forth in the instrument confirms this impression.

Other differences exist between the Community's instrument and United States Section 301. Both are designed to respond more effectively to foreign unfair trade practices, but they emphasize different means. In the United States, Congress steadily developed procedural guarantees enabling the business community to trigger Executive action, and, if need be, unilateral retaliation. In the European Community, drafters expected more from a transfer in internal decision-making authority to galvanize the Community's vigilance, than from introducing a private complaint procedure.

B. Decision-making Authority Under the New Instrument

Article 113 of the EEC Treaty confers decision-making authority in international trade policy matters on the Council. While the Commission has the exclusive right of initiative to submit proposals to the Council and to implement the common commercial policy, the Council decides on the course of action which the Community will take in this area. Thus, if the Commission recommends that the Community participate in or conclude a trade agreement, the Council must authorize the

on the fifteen harmonization directives. Community acts to strengthen policy in unfair trading practice, *Financial Times* (London), Sept. 18, 1984, at 1. According to art. 14, the instrument entered into force on the third day following its publication in the Official Journal of the European Communities on Sept. 20, 1984. The text of the fifteen directives, as finally adopted, is published in 27 O.J. EUR. COMM. (No. L 252) 1 (1984).

necessary negotiations.²⁸⁷ Should these negotiations result in agreement with the Community's trading partner(s), it is the Council which will conclude the agreement.²⁸⁸ Likewise, if the Community considers taking unilateral action, such as retaliation, against its trading partners on the basis of Article 113 of the EEC Treaty, the Council will decide upon the proposal of the Commission.²⁸⁹ Significantly, the Council's unanimous decision is necessary to deviate from the Commission's proposal.²⁹⁰

In practice, the Community's policies in international trade are forged through a delicate interplay between the Member States, the Council and the Commission. Thus, it is often disputed whether issues touching on international trade do fall within the Community's exclusive competence. To a different degree, the Member States jealously guard their sovereign authority and may argue that certain measures remain, in part, within their jurisdiction. For example, the political compromise regarding the conclusion of the GATT Standards Code reflects this sentiment. Both the Council and the Member States signed the Code because some Member States took the position that standards exceeded the field of trade policy by also involving health and safety considerations, which are of national concern.²⁹¹

Even if it is uncontested that a certain subject squarely falls within the ambit of Article 113, the Member States still exert influence on the Community's decision-making processes. For example, once the Council has decided to authorize the Commission to negotiate a Community trade agreement, the Member States continue to be involved.

First of all, when the Commission conducts negotiations on a Community trade agreement, the so-called "113-Committee" composed of representatives of the Member States closely supervises the Commission.²⁹² Should some Member States be dissatisfied with the conduct or the outcome of the negotiations, they do have a second chance to influence the Community's posture when the agreement comes up for conclusion by the Council. Although the Treaty provides in Article 114 that the Council shall act by a qualified majority, the Council customarily seeks a consensus among Member States before it takes a decision. The

²⁸⁷ EEC Treaty, art. 113(3).

²⁸⁸ EEC Treaty, art. 114.

²⁸⁹ EEC Treaty, art. 113(2).

²⁹⁰ EEC Treaty, art. 149.

²⁹¹ On the Community's signing of the Standards Code, *see* Bourgeois, *supra* note 2, at 20-22.

²⁹² EEC Treaty, art. 113(3). *See generally* Jackson, Louis & Matsushita, *Implementing the Tokyo Round: Legal Aspects of Changing Economic Rules*, 81 MICH. L. REV. 267, 282 (1982) (reflecting on the Committee's role during the Tokyo Round negotiations). This study also crisply summarizes the ordinary negotiating process of a trade agreement by the Community. *Id.* at 279.

protracted debate necessitated by this approach tends to paralyze the Council's decision-making capacity, not only with respect to the conclusion of agreements, but also with regard to unilateral action.²⁹³ Presumably, the Council's faltering management of international trade relations prompted the Commission to change its mind in early 1983, when it embraced the concept of a new trade policy instrument.

1. The Commission Proposal

In its version of the new instrument, the Commission in essence proposed that the Council delegate substantial authority over commercial policy. This authority extended beyond the power to respond and retaliate against foreign unfair trade practices. The draft regulation introduced a distinction between:

- (a) responding to any unfair commercial practice attributable to a third country and removing the injury resulting therefrom; and
- (b) ensuring full exercise of the Community's rights pertaining to the fields covered by the commercial policy.²⁹⁴

According to its proposal, the Commission would be authorized to take any measure pursuant to (a) or (b) after consultations with the Member States. If a Member State opposed such a measure, it could refer the Commission's decision to the Council within five days. The Commission's decision would then be suspended until the Council had made up its mind.²⁹⁵ Yet following the Commission's notification of its decision to the Member States, the Council would have only thirty days to react. If within that relatively short period the Council failed to countermand the Commission's decision, the latter would stand.²⁹⁶ This decision-making machinery was aptly referred to as the "guillotine".²⁹⁷

The memorandum accompanying the draft regulation reveals the sweep of delegated authority the Commission was actually seeking. Probably because of its far-reaching objective to strengthen the common commercial policy altogether, the Commission did not distinguish clearly between the exercise of the Community's international rights in response

²⁹³ Commission president Thorn recently highlighted once more the Council's practice to substitute consensus in place of a majority vote as a major reason for the Community's decision-making paralysis. Thorn, *Address to International Bar Association Seminar* (January 1984), 12 INT'L BUS. LAW. 315, 316 (1984).

²⁹⁴ Arts. 1 and 2(1) of the Commission proposal, *supra* note 267.

²⁹⁵ Suspension would not apply to measures taken by the Commission in emergency situations where delay might result in injury which would be difficult to remedy. Arts. 12 and 13(2) of the Commission proposal, *supra* note 267. The Council eliminated the notion of emergency measures in the final regulation. See *infra* text accompanying note 317.

²⁹⁶ Art. 13 of the Commission proposal, *supra* note 267.

²⁹⁷ EUR. COMM. COM. (83) 87 def., at 4 (1983).

to unfair trade practices and the exercise of other Community rights in the trade policy area. Thus, the Commission indicated that clause (b) included recourse to GATT dispute settlement procedures.²⁹⁸ It would seem to follow that clause (a) was only meant to refer to internal Community investigations of complaints about foreign unfair trade practices. This reading, however, obliterates the phrase "and removing the injury resulting therefrom" in clause (a).

Other examples of Community rights which the Commission intended to exercise pursuant to clause (b) created ambiguities. In a memorandum accompanying its draft, the Commission mentioned:

requests for compensation pursuant to Article XIX (the GATT safeguard clause), *etc.* for which no specific Community procedure exists at present. (emphasis supplied)²⁹⁹

This open-ended formula arguably covered the exercise of most, if not all, rights accruing to the Community under the GATT.³⁰⁰ One might observe that the Commission only claimed limited delegated authority, in that it merely sought to exercise rights for which no specific Community procedure existed other than the general decision-making procedure of Article 113 of the EEC Treaty. In this view, the Commission would not have had authority to impose safeguard measures pursuant to Article XIX, for instance, because the Community's common import regimes set forth escape clause mechanisms.³⁰¹ Yet the limitation suggested by the Commission was by no means waterproof, if only because according to its proposal the new instrument would have operated "by way of complement" to the other rules in the commercial field.³⁰²

Such a comprehensive delegation of authority to the Commission was unacceptable to the Member States. Opposition came from unexpected quarters, however. To some extent, the Commission may have miscalculated its bases for support. The position of the Dutch govern-

²⁹⁸ *Id.* at 2.

²⁹⁹ *Id.*

³⁰⁰ Although the Community officially is not party to the GATT, the Contracting Parties do recognize the replacement of the individual Member States by the Community within GATT, which, according to the European Court of Justice, occurred at the entry into force of the Common Customs Tariff (July 1, 1984). The Court construed full Community substitution for the first time in *Douaneagent der N.V. Nederlandse Spoorwegen v. de Inspecteur der Invoerrechten en Accijnzen*, 1975 Eur. Comm. Ct. J. Rep. 1439 (recital 21) (1975). This judgement was repeated in *Amministrazione delle Finanze dello Stato v. Società Petrolifera Italiana SpA et alii*, 1983 Eur. Comm. Ct. J. Rep. 801 (recital 19) (1983).

³⁰¹ *E.g.*, 25 O.J. EUR. COMM. (No. L 35) 1 (1982) (Reg. 288/82, arts. 15 and 16). See generally van Dartel, *De Algeme Invoerverordeningen van de EEG*, 32 SOCIAAL-ECONOMISCHE WETGEVING 406 (1984); Völker, *The Major Instruments of the Common Commercial Policy*, in PROTECTIONISM AND THE EUROPEAN COMMUNITY 17, 39-48 (Völker ed. 1983).

³⁰² Art. 14 of the Commission proposal, *supra* note 266.

ment is a case in point. Traditionally, the Netherlands favors effective Community policies, and is generally prepared to delegate authority to the Commission in order to achieve this objective. Yet reservations towards the new instrument created a dilemma for the Dutch authorities. Fearing that the Commission might bow to protectionist pressures in applying the new instrument, the Netherlands felt obliged to resist broad delegation of decision-making authority to the Commission.³⁰³

Faced with considerable resistance from many Member States, the Commission tried to save the "guillotine" machinery from destruction. In October of 1983, it proposed, among other things, to extend the period in which the Council could reconsider decisions of the Commission at the request of a Member State from thirty to sixty days. Furthermore, the Commission expressed a willingness to abide by the prevailing opinion in the Council in exercising its delegated authority.³⁰⁴ These and other basically cosmetic changes to the "guillotine" machinery did not pacify the opposition, however.

2. The Council Regulation

The Council maintained the bifurcation in the instrument's scope which the Commission had originally proposed. Yet it firmly segregated the Community's response to unfair trade practices in clause (a) from a full exercise of the Community's rights pertaining to trade policy in clause (b). The Council refused to delegate authority to the Commission with regard to clause (b).³⁰⁵ In this respect the Commission failed in its innovative efforts, because the Council essentially stuck to the procedures of Article 113 of the EEC Treaty. Other than the Council's unenforceable determination to exercise the rights of the Community within thirty days after a relevant proposal from the Commission, the new instrument does not add much to existing practice.³⁰⁶

The Commission was more successful in obtaining authority to deal with foreign unfair trade practices. First, the Commission now is formally charged with investigating complaints about foreign unfair trade practices.³⁰⁷ If at the end of this investigation the Commission feels that it is not in the Community's interest to pursue the complaint, it may

³⁰³ See generally the debate between Wellenstein and De Grooth in EEG-HANDELSPOLITIEK EN BESCHERMENDE MAATREGELEN TEGEN DE INVOER UIT DERDE LANDEN 12-13 (1984).

³⁰⁴ EUR. COM. SEC., (83) 1547 final (1983). These proposals were discussed in *Het Voorgestelde Nieuwe Handelspolitieke Instrument*, 26 EUROMARKT-NIEUWS 245, 246 (1983).

³⁰⁵ 27 O.J. EUR. COMM. (No. L 252) 5 (1984) (Reg. 2641/84, art. 11(3)).

³⁰⁶ *Id.* The Council's determination to take a speedy decision is unenforceable because there is no remedy or sanction (e.g., "guillotine") if the Council fails to do so.

³⁰⁷ 27 O.J. EUR. COMM. (No. L 252) 3 (1984) (Reg. 2641/84, art. 6).

terminate the proceedings.³⁰⁸ Should the Commission determine, however, that the foreign practice complained of is both unfair and injurious, the Commission is authorized to initiate international dispute settlement proceedings.³⁰⁹ In other words, the Commission is entitled to exercise a *procedural* right of the Community in response to unfair trade practices.

The "guillotine" was preserved for the decisions concluding the internal investigation of the Commission with regard to termination or continuance on the international plane. A Member State can object to the Commission's disposition of a complaint and refer the matter to the Council. If the Council fails to overrule the Commission's decision within thirty days after the matter was presented to it, the decision of the Commission stands.³¹⁰ Lastly, upon the proposal of the Commission, the Council will decide at the end of international consultations or dispute settlement proceedings whether and which retaliatory measures are due.³¹¹ Thus, the Council retained the *substantive* rights of the Community relating to foreign unfair trade practices.

To some, it may seem that the new instrument therefore does not really affect the balance of powers between the Commission and the Council in international trade policy.³¹² This view, however, underestimates the importance of the Commission's investigative authority and its authority to initiate international dispute settlement proceedings.

As we have seen, the GATT Contracting Parties rarely authorize retaliation.³¹³ Since the Community professes to observe its international obligations in applying the new instrument, one may expect that the Council will not have much occasion to exercise its retaliatory authority vis-à-vis GATT contracting parties, which are the Community's most important trading partners. Experience with Section 301 underscores that, at least within the context of GATT, diplomatic strategy and international pressure are more effective in resolving complaints of unfair trade practices.³¹⁴ Hence, it is of great significance that the Commission has assumed authority under the new instrument to marshal the Community's negotiating resources in pursuing these complaints.

The Commission also won a victory on another issue which, though not necessarily related, became enmeshed in the discussions regarding the instrument's decision-making machinery. Practice so far had been

³⁰⁸ 27 O.J. EUR. COMM. (No. L 252) 5 (1984) (Reg. 2641/84, art. 9(1)).

³⁰⁹ 27 O.J. EUR. COMM. (No. L 252) 5 (1984) (Reg. 2641/84, arts. 10(1)(a) and 11(2)(a)).

³¹⁰ 27 O.J. EUR. COMM. (No. L 252) 5 (1984) (Reg. 2641/84, arts. 9(1), 10(2), 11(2)(a) and 12).

³¹¹ 27 O.J. EUR. COMM. (No. L 252) 5 (1984) (Reg. 2641/84, arts. 11(2)(b) and 19(1) and (3)).

³¹² See *Een nieuw handelspolitiek instrument*, 27 EUROMARKT-NIEUWS 126, 128 (1984).

³¹³ See *supra* text accompanying note 154.

³¹⁴ See *supra* text accompanying note 155.

that the Commission on its own motion accepted export restraint commitments from countries who feared protectionist measures from the Community. The Court of Justice seemed to have endorsed this practice.³¹⁵ During the Council meeting in April of 1984, however, the three liberal Member States (Denmark, Germany and the Netherlands) attempted to condition acceptance of VRAs on Council approval, in conformity with the procedures relating to the exercise of Community rights as stated in clause (b). According to press reports, the attempt was unsuccessful because the other Member States outvoted the three liberal Member States.³¹⁶

This victory is even more remarkable given that the Council at the same time denied explicit authority to the Commission to take protective measures on its own initiative. Pursuant to its proposal for the new instrument, the Commission would have been empowered to take protective measures in "critical circumstances" which justified "immediate action to safeguard Community interests".³¹⁷ The Council deleted this provision in Regulation 2641/84.

C. Disposition of Private Complaints Under the New Instrument

At the time of its negotiation, the instrument was seen primarily as a vehicle to delegate authority from the Council to the Commission in trade policy matters. Therefore, this aspect became the focal point of much of the debate on the instrument's significance. Skirmishes did occur in the background, however, with respect to the establishment of a private complaint procedure.

As late as the Council meeting in April of 1984, Germany and Denmark refused to grant private firms the right to bring complaints directly before the Commission. Instead, they proposed that private petitioners first appeal to their national authorities. Only with the approval of the national government could a private complaint be brought before the Commission in their view.³¹⁸ The Council overruled these proposals.

The advisory Economic and Social Committee, composed of representatives of various private interest groups (e.g., trade, industry, agriculture, labour³¹⁹) supported the Commission proposal for a private

³¹⁵ *Dürbeck v. Hauptzollamt Frankfurt*, 1981 Eur. Comm. Ct. J. Rep. 1095, 1118 (recitals 39-40) (1981). See Sack, *The Commission's Powers under the Safeguard Clauses of the Common Organization of Agricultural Markets*, 20 COMMON MKT. L. REV. 757, 763-64 (1983).

³¹⁶ Agence Europe, Apr. 11, 1984, at 5.

³¹⁷ Art. 12 of the Commission proposal, *supra* note 266.

³¹⁸ Agence Europe, Apr. 11, 1984, at 5.

³¹⁹ See EEC Treaty, art. 193.

complaint procedure.³²⁰ Yet in some Member States (notably Germany and the Netherlands), private industry appeared to be divided on the importance of an independent and formalized right to complain of foreign unfair trade practices. One might have expected the business community to applaud the instrument's introduction of procedural safeguards regarding private petitioners without qualification. After all, it was the lack of such procedural safeguards which moved United States business interests to first support and then insist on reinforcement of Section 301. In these EEC Member States, however, industries with an interest in liberal trade—exporters and importers—tended to oppose the instrument.³²¹

In light of its French parentage, the instrument was reputed to be protectionist in outlook. Rather than risking foreign retaliation in response to Community restrictions imposed under the new instrument, liberal traders apparently preferred to forego a private right to complain of foreign unfair trade practices. The instrument's potential to help eliminate foreign barriers to Community exports rarely was fully recognized. Those industry representatives who did recognize this potential welcomed the instrument's adoption, though they warned against its protectionist tendencies.³²²

In analyzing the instrument from the perspective of private petitioners, one first must recognize that they can only invoke the instrument to complain of foreign "illicit" trade practices. Thus, petitioners cannot request that the Community fully exercises its rights in the common commercial policy area regarding "fair" trade restrictions.³²³ In this respect, the new instrument already appears more restrictive towards private complainants than Section 301.³²⁴

Consider the example of a foreign country which considers increasing its import duty on widgets in conformity with Article XXVIII of the GATT regarding the renegotiation of tariff concessions. In that event, the Community's widget-producing industry could not invoke the new

³²⁰ The observations of the Economic and Social Committee on the Commission proposal are reprinted in 26 O.J. EUR. COMM. (No. C 211) 26 (1983). In this connection, see particularly its comments on art. 3(4) of the Commission proposal.

³²¹ *Groothandel vreest EEG-protectionisme*, *Financieel Dagblad*, Apr. 7, 1983, at 1.

³²² E.g., Chorus, *EEG Handelspolitiek en Protectionisme: een Visie vanuit het Dedrijsleven*, in *EEG-HANDELSPOLITIEK EN BESCHERMENDE MAATREGELEN TEGEN DE INVOER UIT DERDE LANDEN* 7, 9-10 (1984).

³²³ 27 O.J. EUR. COMM. (No. L 252) 2 (1984) (Reg. 2641/84, arts. 1 and 3(1)).

³²⁴ Under Section 301, private petitioners may request that the President enforce the rights of the United States under any trade agreement. 19 U.S.C. § 2412 and 2411(a)(1) (1982). To date, however, no 301 petition has been filed which requests action solely on this basis. Archibald, *supra* note 107, at VII-10.

instrument to ward off the threat of increased duties to its market position in that country. Conceivably though, if following a petition by the industry, the Community would intervene and hold out the prospect of stiff compensation demands, the foreign country concerned might change its mind.

There seems to be no good reason to limit private access under the instrument to "illicit" trade practices, since both fair and unfair trade restrictions injure Community industry, and both type of restrictions may be removed by applying international pressure. Indeed, the instrument could have served as a vehicle to formalize Community investigations into foreign trade restrictions generally. Case-by-case investigations of foreign trade restrictions, supported by private petitions containing in-depth analyses of market conditions, might contribute to the elimination of trade barriers. The momentum created by concerted efforts of interested parties and public authorities according to set procedures should not be underrated. Yet as long as the Council does not delegate some authority to the Commission to exercise the Community's rights in the trade policy area, other than the procedural right to respond to unfair trade practices, a comprehensive and vigorous attack from the Community on world trade barriers remains largely illusory.

Returning to the private complaint procedure established by Regulation 2641/84 (the "Regulation"), it is useful to recall the terms of reference of Section 301. Indeed, other than a citation to Section 301, the public record offers little, if any guidance to the disposition of private complaints under the new instrument. Judged by the text of the Regulation alone, private petitioners have few guarantees and numerous handicaps in pressing complaints about foreign unfair trade practices.

1. Admissibility Requirements

Natural or legal persons (including an association which does not have legal personality) acting on behalf of a Community industry can lodge a complaint with the Commission.³²⁵ Only producers of industrial or agricultural products or manufacturers and processors of products which are the subject of unfair practices may raise complaints.³²⁶ Accordingly, the Council did not adopt proposals to allow trading concerns to invoke the new instrument.³²⁷ Because the petitioning industry is to

³²⁵ 27 O.J. EUR. COMM. (No. L 252) 2 (1984) (Reg. 2641/84, art. 3(1)).

³²⁶ 27 O.J. EUR. COMM. (No. L 252) 2 (1984) (Reg. 2641/84, art. 2(4)).

³²⁷ *Id.* The Economic and Social Committee, in its comments on the Commission proposal, had proposed that trading concerns also be permitted to invoke the new instrument. 26 O.J. EUR. COMM. (No. C 211) 24 (1983).

be engaged in the production of goods, the new instrument probably does not admit complaints about foreign restrictions on Community services and investments.

a. Community Industry

The Regulation spells out in considerable detail what is meant by the term "Community industry".³²⁸ As a result, complaints of regional industries, which represent only part of the Community industry, may also be admitted under certain circumstances. Thus, producers in a region of the Community are deemed to represent a Community industry if their combined output constitutes the "major proportion" of the production of the product concerned in the Member State(s) in which this region is located, provided that:

- (i) where the illicit practice concerns imports into the Community, their effect is concentrated in that Member State or those Member States, or
- (ii) where the illicit practice concerns Community exports to a third country, a significant proportion of the output of those producers is exported to the third country concerned.³²⁹

While this definition of "Community industry" is more encompassing than the one proposed by the Commission³³⁰, it is still quite restrictive. Consider the example cited above of a violation of the Government Procurement Code within a Community context.³³¹ The Commission would not admit a complaint of a Dutch company whose bid for a foreign government's purchasing contract was denied in contravention of the Government Procurement Code. Even if one of the European associations, such as UNICE, representing various Community industries, would entertain the complaint of the Dutch company, the Commission would probably still have to refuse to investigate this matter.

b. Injury

The Regulation establishes that a petitioner should not act only on behalf of a Community industry in order for the complaint to be admissible. The petitioner must also demonstrate that the allegedly unlawful

³²⁸ 27 O.J. EUR. COMM. (No. L 252) 2 (1984) (Reg. 2641/84, art. 2(4)).

³²⁹ *Id.*

³³⁰ Art. 2(2) of the Commission proposal provided: "The term 'Community industry' shall be taken to mean the Community producers as a whole, of products identical or similar to the product which is the subject of unfair practices or of products competing directly with that product, or those producers whose combined output constitutes a major proportion of total Community production of the products in question." See *supra* note 266. Thus, on the one hand, the Commission did not appear to accept processors of the litigious products as petitioners under the new instrument, while on the other hand, it seemed unwilling to entertain complaints of regional industries. *Id.*

³³¹ See *supra* text accompanying notes 145-49.

practice injures or threatens to cause injury to a Community industry.³³² This stringent injury requirement represents a serious hurdle for private petitioners.

Many petitioners who may have valid complaints about foreign unfair trade practices cannot gain admission under the instrument. The Dutch company, for instance, which claimed infringement of the Government Procurement Code, by definition could not show injuries to its European competitors.³³³ Again, it is submitted that such a restricting injury requirement at the stage of admitting complaints is inappropriate. It unduly restrains the use of the instrument to combat foreign unfair trade practices.

For a variety of reasons, however, the Commission felt compelled to limit access of private petitioners under the new instrument, by insisting on a Community-wide representation and injury requirement. In this way, the Commission sought to minimize concerns of those Member States which objected to the instrument's protectionist potential. Furthermore, the Commission wanted to avoid opening a costly investigation where there is no *prima facie* general material interest at stake. In addition, the Commission apparently sought consistency with other Community trade laws.³³⁴ These considerations are vulnerable to challenge.

a. The admission of a complaint does not necessarily result in protectionist action. By admitting a complaint, the Commission can only institute international consultations or dispute settlement proceedings, and submit proposals for action to the Council. Accordingly, there is no reason to refuse admission *a priori* to petitioners who do not meet the stringent Community-wide injury requirement, out of concern for protectionist measures. A stringent injury requirement would only be appropriate when the Council is to decide on the feasibility of retaliatory protectionist measures when the Council is to determine whether "action is necessary in the interests of the Community."³³⁵

b. Another argument proposes that stringent admissibility requirements are justified in order to prevent the Community from spending resources on relatively insignificant complaints. This argument, however, undermines the foundations of legal certainty in international trade

³³² 27 O.J. EUR. COMM. (No. L 252) 2 (1984) (Reg. 2641/84, arts. 3(2) and 8). The Commission proposal, in arts. 2(3) and 3(1), contained a similar requirement. See *supra* note 266.

³³³ See *supra* text accompanying note 147.

³³⁴ Interview with Dr. Jacques H.J. Bourgeois, Head of the Trade Policy Instruments Division, Commission of the European Communities (Sept. 18, 1984).

³³⁵ 27 O.J. EUR. COMM. (No. L 252) 5 (1984) (Reg. 2641/84, art. 10(1)).

relations. In addition, the admissibility requirements currently drafted in Regulation 2641/84 do not meet this objective.

Because for all practical purposes private complainants depend on their national government in the event they are confronted with foreign unfair trade practices,³³⁶ government intervention should not be solely contingent upon the monetary or political interests involved. Issues of principal importance can, of course, be raised by "small" cases. If one neglects to pursue these issues in relatively insignificant cases, the difficulties in resolving the same issues are compounded in major disputes when political considerations may obscure the rule of law. In other words, building precedents through relatively uncontroversial cases may well help reinforce the international trading regime. Furthermore, refusing admission to businesses merely because of their size or the interests they represent is unsound policy, when national and Community authorities encourage these same businesses to venture outside their national jurisdictions and participate in international trade.

Moreover, if indeed the instrument's admissibility requirements have been designed, among other things, to avoid overtaxing the Community's resources by limiting access exclusively to petitioners who can demonstrate a "Community-wide" impact of foreign unfair trade practices, the present requirements fail to meet this objective. Or to be more precise, the present notion of "Community-wide" injury yields incongruous results. Presumably this notion corresponds with a minimum-threshold of injury, in order to avoid the investigation of *de minimis* complaints. Only if a certain number of jobs, a certain level of production-capacity, a certain amount of investments etc., is adversely affected by an unfair foreign practice is the Commission instructed to intervene. The Regulation itself, however, already allows for considerable discrepancies between the requisite level of injury.

Recall, for instance, that if an illicit foreign practice injures a majority of exporting producers in a certain region of the Common Market, the effects of which are concentrated in that region, then the exporting procedures qualify as petitioners under the instrument.³³⁷ Clearly, whether the region in issue is a single, small Member State like Ireland, or the territory of France and Germany combined, can make a world of difference in terms of jobs, investments, production-capacity, etc. Yet the Regulation appears to admit petitioners representing the industry in a small Member State, to the extent that the impact of the disputed foreign practice is concentrated in that Member State. Conversely, an industry

³³⁶ See *supra* text accompanying notes 1-25.

³³⁷ 27 O.J. EUR. COMM. (No. L 252) 2 (1984) (Reg. 2641/84, art. 2(4)(b)(ii)).

in a large Member State, representing the same number of jobs and level of production-capacity, would not be admitted as complainant if it could not show that a majority of that Member State's producers were affected by the foreign practice, *despite the fact that the complaining industry might be the only exporter to the foreign country concerned.*

Even if one is willing to accept these divergences for political reasons, incongruities remain. Consider the example of corporation A which is the only producer in the Community of widgets because, for instance, it is the patent holder for widgets. If this corporation encounters trade restrictions in country Z, its complaint under the new instrument would be admissible, assuming that no other producers in the Community manufacture identical or similar products. Now consider the position of another corporation B *in the same Member State* of a similar size, having made comparable investments in gadgets. Other corporations in this Member State manufacture gadgets, yet only B exports these gadgets to country Z. Were B to encounter trade restrictions in Z, however, it could not successfully lodge a complaint under the new instrument!

The outcome is even more peculiar if one considers the possibility that one and the same corporation C is the only producer of widgets, yet one of several producers of gadgets in a Member State. Now suppose that C is the only corporation in this Member State which exports widgets and gadgets to country Z and that Z restricts these exports unfairly. C's complaint about the restriction on widgets would be admissible, but a complaint about the restriction on gadgets would not be admissible under the new instrument.

Retaliation is a different matter. Conceivably, it is not in the interest of the Community to take retaliatory measures against country Z in response to the latter's restrictions on products originating in one corporation of one Member State, even if the Community would be authorized to retaliate by the GATT contracting parties. Yet there is no sound policy reason to distinguish between A's complaint (or C's widget complaint) and B's complaint (or C's gadget complaint) when it comes to investigating these complaints. Both complainants ought to be able to invoke the normative authority of international (GATT) commitments through government intervention if a violation of these commitments is at stake.

c. The instrument's structure clearly reflects the drafters' quest for consistency with other Community trade laws. In many respects, the instrument is patterned after the Community's antidumping and counter-

vailing duty law.³³⁸ Among political circles there was concern that the new instrument might create a spill-over effect on other trade policy instruments. If the new instrument would have relaxed the admissibility (injury) requirements, some feared that industry groups would have insisted on loosening the admissibility requirements in the Community's antidumping and countervailing duty law as well.³³⁹

This analogy is misplaced. The object of an antidumping or countervailing duty investigation is to determine whether countervailing measure should be imposed in order to eliminate the injury caused to a Community industry by dumped or subsidized imports. GATT permits a unilateral response to these particular forms of unfair trade, if certain conditions (notably an injury requirement) are met. Because import restricting measures invariably hurt other sectors of the economy, these restraints also make good sense from a domestic policy viewpoint of the applicant State.

Yet other than dumping or certain kinds of subsidization, the GATT does not identify unfair trade practices against which contracting parties may retaliate unilaterally. The only lawful recourse available to injured contracting parties in these circumstances is to appeal to the GATT Contracting Parties (or, as the case may be, Code signatories) and to request that the disputed practices are held to nullify or impair benefits accruing to the applicant State. If these practices are condemned, the GATT membership will rarely authorize retaliation. Instead, contracting parties generally rely on the normative force of such a ruling and expect that the party held to violate its GATT commitments will comply of its own accord.³⁴⁰

Consequently, the policy underlying restraints on the investigation of countervailing measures against dumped or subsidized imports cannot be transposed to investigations of other unfair trade practices. Investigations of other unfair trade practices do not necessarily lead to unilateral import restrictions which would affect domestic consumers of these products. Rather, the objective of these investigations is to eliminate the disputed practices through the pressure of international scrutiny. Again, only in the extraordinary event that the GATT membership authorizes

³³⁸ Thus the definition of "Community industry" in the new instrument emulates the definition in the antidumping and countervailing duty law. 27 O.J. EUR. COMM. (No. L 201) 1 (1984) (*compare* Reg. 2461/84, art. 2(4) with Reg. 2176/84, art. 4(5)). Also striking are the similarities in the injury criteria of the instrument and the antidumping and countervailing duty law. 27 O.J. EUR. COMM. (No. L 201) 1 (1984) (*compare* Reg. 2461/84, art. 8 with Reg. 2176/84, art. 4(1), (2) and (3)).

³³⁹ Telephone interview with Dr. Jacques H.J. Bourgeois, Head of the Trade Policy Instruments Division, Commission of the European Communities (Sept. 20, 1984).

³⁴⁰ See *supra* text accompanying notes 154-55.

the Community to retaliate following a complaint under the new instrument, would it be appropriate to insist on a stringent injury requirement before the Community actually exercises this authority. As a condition to investigating private complaints under the new instrument, however, such restrictive admissibility requirements are ill-considered.

c. Judicial review

Barring special circumstances, the Commission shall decide whether to open a so-called "Community examination procedure" within 45 days after the date a complaint has been filed.³⁴¹ During this 45-day period, the Commission reviews the admissibility of a private complaint, in consultation with an "Advisory Committee" composed of representatives of the Member States and chaired by a Commission representative.³⁴² The opinion of the Advisory Committee does not bind the Commission. Neither does the Regulation contain a procedure through which at the request of a Member State, the Council could overturn the Commission's decision (not) to open an examination procedure.

Should the Commission decide not to admit a private complaint, it is questionable whether the petitioner could successfully apply for judicial review of this decision. Two avenues are available to submit the decision to the Court of Justice for review.

The petitioner could invoke Article 175 of the EEC Treaty, claiming that the Commission's failure to act infringes its obligations under the Treaty. Although these obligations can be broadly interpreted and include binding rules of international law³⁴³, this action is likely to fail. Neither the Treaty itself, nor international law impose an obligation on the Community authorities to intervene with a foreign government on behalf of a private petitioner.

Secondly, the petitioner might consider invoking Article 173 of the EEC Treaty, claiming that the Commission's decision not to admit his complaint is inconsistent with Regulation 2641/84. According to Article 173, however, natural or legal persons can only institute proceedings against decisions addressed to them, or which are of direct and individual concern to them. Whether the Court will review an often informal notification from the Commission to complainants that it will not initiate an investigation, is a question which in the context of the antidumping and

³⁴¹ 27 O.J. EUR. COMM. (No. L 252) 3 (1984) (Reg. 2641/84, art. 6(8)). In special circumstances, this period may be extended to sixty days. *Id.*

³⁴² 27 O.J. EUR. COMM. (No. L 252) 2 (1984) (Reg. 2641/84, arts. 3(5) and 5).

³⁴³ H. SCHERMERS, JUDICIAL PROTECTION IN THE EUROPEAN COMMUNITIES §§ 33 and 332 (3d ed. 1983).

countervailing duty law remained undecided for some time. Only recently, the Court gave an affirmative answer.³⁴⁴ It derived the right to judicial review from the complainant's procedural position in the antidumping and countervailing duty law. Thus the Court emphasized that the relevant regulation recognized the existence of a legitimate interest of Community producers in the institution of countervailing and antidumping duties and in the respect of certain procedural rights.³⁴⁵

Arguably, petitioners under the new instrument have a comparable procedural position and should therefore qualify under Article 173 in the event that they want to challenge the Commission's refusal to admit their complaints. Community producers have a legitimate interest in the investigation of complaints about unfair foreign trade practices, and they enjoy certain procedural rights.³⁴⁶ Still, there are differences between investigating antidumping or countervailing duty complaints and complaints about other unfair foreign trade practices.

National antidumping and countervailing duty laws implement GATT-defined notions of unfairness. In other words, the unfairness of the disputed foreign practices according to GATT principles is not in issue here. Suppose, in contrast, that the Commission rejects a controversial complaint under the new instrument, arguing that petitioners did not present sufficient evidence that the foreign government violated its GATT commitments. To review this determination, the Court would have to interpret the GATT, which so far it has refused to do at the request of private petitioners.³⁴⁷ Although it is not inconceivable nor inappropriate that the Court do so, this is an additional hurdle which private petitioners under the new instrument would have to take.

³⁴⁴ *Fediol v. Commission*, 1983 E. Comm. Ct. J. Rep. 2913, annotated by Lauwaars in 32 *SOCIAAL-ECONOMISCHE WETGEVING* 770 (1984). See generally Bellis, *Judicial Review of EEC Anti-Dumping and Anti-Subsidy Determinations After FEDIOL: The Emergence of a New Admissibility Test*, 21 *COMMON MKT. L. REV.* 539 (1984).

³⁴⁵ *Id.* (recital 25). As examples of petitioners' rights under the antidumping and countervailing duty law, the Court cited the right to complain, the right to have the complaint investigated by the Commission with due care, and the right to receive information. *Id.* (recital 28).

³⁴⁶ *E.g.*, 27 O.J. EUR. COMM. (No. L 252) 2 and 3 (1984) (Reg. 2641/84, art. 3(1) (the right to complain), art. 6(4)(b) (the right to receive information), and art. 6(6) (the right to have the Commission convene a meeting with opposing parties)).

³⁴⁷ See *supra* note 13. Note that on these occasions the Court was asked to give a preliminary ruling pursuant to EEC Treaty, art. 177, where the issue was whether the GATT has "direct effect" in the Community legal order. Since "direct effect" is a matter for national court proceedings, it is conceivable that this requirement would not prevail in a direct action before the European Court under EEC Treaty, art. 173. Accordingly, the Court may interpret the GATT in a 173-proceeding. See Schermers, *Community Law and International Law*, 12 *COMMON MKT. L. REV.* 77, 85-87 (1975).

2. Community Examination Procedure

If a private petitioner has met the admissibility requirements (*i.e.*, has demonstrated a Community industry which is injured due to an illicit trade practice of a foreign country), he is not assured that the Commission will investigate his complaint. According to the Council's instructions, the Commission will only examine a complaint, if this is "necessary in the Community interest".³⁴⁸ Yet, as a matter of principle, it would seem that an examination of an illicit and injurious foreign trade practice is necessarily in the Community interest.

A grant of unlimited discretion to the Commission in connection with the initiation of an (internal) investigation, would have negated the procedural safeguards awarded to private petitioners in Regulation 2641/84. The drafting history of the instrument reveals that the Council did not intend to grant such limitless discretion to the Commission. Rather, the Council's objective in inserting the "Community interest" in this early phase of the proceedings, was to prevent judicial review of a Commission decision (not) to investigate a private complaint.³⁴⁹ To express this differently, it appears that the Council merely wanted to endow the Commission with limited discretion sufficient to block judicial review, but not so much as to leave the Commission complete liberty in deciding whether or not to examine a private complaint. This half-hearted attempt of the Council to stop the Court of Justice from exercising review at that stage of the administrative proceedings is, however, likely to fail.³⁵⁰

³⁴⁸ 27 O.J. EUR. COMM. (No. L 252) 3 (1984) (Reg. 2641/84, art. 6(1)).

³⁴⁹ Hilf & Rolf, *Das "Neue Instrument" der EG: Eine rechtsstaatliche Stärkung der gemeinsamen Handelspolitik?*, 31 RECHT DER INTERNATIONALEN WIRTSCHAFT 297, 309 (1985). They indicate that the Council inserted the "Community interest" requirement here as a response to the Court's judgment in the *Fediol* case, *supra* note 344. In *Fediol* the Court reviewed a Commission decision not to institute a countervailing duty investigation at the request of a group of Community producers of soya meal (*Fediol*). Significantly, as opposed to the opening of an investigation pursuant to the trade policy instrument, the Commission is not to take into account "Community interests" this early in an antidumping or countervailing duty proceeding, but "shall immediately" initiate an investigation once a Community industry has shown sufficient cause. See 27 O.J. EUR. COMM. (No. L 201) 1 (1984) (Reg. 2176/84, art. 7(1)).

³⁵⁰ In *Fediol* the Court acknowledged that the Commission was granted "very wide" discretionary powers to adopt countervailing duties (recital 26). Yet at the same time, the Court recognized the "legitimate interests" of Community producers in the adoption of such anti-subsidy measures (recital 25), and declared *Fediol*'s appeal against the Commission's refusal to initiate an investigation admissible.

By the same token, the Commission may have "some" discretion in investigating a private complaint under the trade policy instrument, but this discretion does not deprive Community industries of a legitimate interest in such an investigation. Hence, Commission decisions on whether to initiate an investigation under the new instrument are likely to be judicially reviewable, in light of the Court's reasoning in *Fediol*.

In the event the Commission decides to open an examination procedure, it will publish this decision and a summary of the complaint in the Official Journal of the European Communities.³⁵¹ The government authorities of the countries concerned will be officially notified. Unlike the USTR in a Section 301 proceeding, however, the Commission has discretion whether or not to request consultations with the foreign authorities at this stage.

As part of its investigations, the Commission will examine the extent to which the foreign practice injures (or threatens to injure) petitioners. The wording of the injury test is reminiscent of the one set forth in the antidumping and countervailing duty law.³⁵² Yet it is unlikely that their interpretation will be similar, particularly in respect of complaints under the new instrument about barriers to Community exports.

If a Community industry calls attention to an existing barrier to entry in a foreign country, many of the factors listed in the current injury test will be hard to evaluate. Thus it would be guess-work to estimate the sales potential, profitability, etc. of petitioners in the event that they would be able to enter the foreign market. Speculation of this kind is the livelihood of commercial analysts, but should not determine bureaucratic decision-making on the propriety of government intervention. The Regulation appears to recognize this point, by making provision for complaints which can merely allege a threat of injury. As one of the factors which the Commission then is to take into account, the Regulation lists:

export capacity in the country of origin or export, which is already in existence or will be operational in the foreseeable future, and the likelihood that the exports resulting from that capacity will be to the market where the competition with Community products is taking place.³⁵³

Indeed, if petitioners can reasonably argue that the foreign trade barrier violates GATT commitments of the country concerned and that this violation is of more than theoretical interest to them, the Commission should favourably consider pursuing the matter on the international plane. To express this differently, the relevant test should be *interest to sue*.³⁵⁴ This is a test which petitioners can be required to meet when they formally file a complaint with the Commission. The forty-five days which the Commission now has to decide on the admissibility of a complaint should be adequate to determine whether petitioners have established a private interest to sue.

³⁵¹ 27 O.J. EUR. COMM. (No. L 252) 3 (1984) (Reg. 2641/84, art. 6(1)(a)).

³⁵² 27 O.J. EUR. COMM. (No. L 201) 1 (1984) (compare Reg. 2461/84, art. 8(1) with Reg. 2176/84, art. 4(2)).

³⁵³ 27 O.J. EUR. COMM. (No. L 252) 4 (1984) (Reg. 2641/84, art. 8(2)).

³⁵⁴ See *supra* text at note 152.

A separate examination procedure duplicates the admissibility review and needlessly delays Community action. The Regulation now envisages that the Commission will draw up a report on its findings within a period of five to seven months after it has announced to further examine the complaint.³⁵⁵ This means that it may take up to nine months after a complaint has been filed before the Commission considers whether international consultations or dispute settlement proceedings should be pursued.

In case the Commission does consider international action appropriate, it must notify the Advisory Committee of its decision.³⁵⁶ Opposition of a Member State may further delay implementation of this decision by another 40 days.³⁵⁷ In total, almost eleven months may lapse before a private complainant receives the benefit of Community intervention on the intergovernmental plane. This is a serious flaw in the procedure, which probably has to be attributed to the unfortunate parallel between the instrument and the Community's antidumping and countervailing duty law.³⁵⁸

Much will depend on the Commission's handling of private complaints during the preliminary stages. The text of the Regulation does not prevent the Commission from closing the examination procedure soon after it has decided to admit a complaint. This, in fact, should be encouraged.

3. International Investigation and Retaliation

The final stage of the complaint procedure may be disquieting to a private petitioner. It is imbued with administrative discretion, and does not subject the Community authorities to effective time limits.

a. Community interest

In case a complaint is directed against a GATT contracting party, consultations and dispute settlement proceedings must precede any decision by the Council on Community retaliation.³⁵⁹ This prerequisite is commendable, in that it reinforces Community compliance with GATT norms and procedures. The Regulation further instructs the Commission to initiate an international investigation (*e.g.*, a GATT panel pro-

³⁵⁵ 27 O.J. EUR. COMM. (No. L 252) 3 (1984) (Reg. 2641/84, art. 6 (9)).

³⁵⁶ 27 O.J. EUR. COMM. (No. L 252) 5 (1984) (Reg. 2641/84, arts. 10(1), 11(2)(a) and 12).

³⁵⁷ 27 O.J. EUR. COMM. (No. L 252) 6 (1984) (Reg. 2641/84, art. 12).

³⁵⁸ From the perspective of a private petitioner, this parallel may give rise to one favorable circumstance, in that it has increased the chances for judicial review of the Commission's decision not to admit a complaint in view of the Court's *Fediol* judgment, *supra* note 344.

³⁵⁹ 27 O.J. EUR. COMM. (No. L 252) 5 (1984) (Reg. 2641/84, art. 10(2) (the "guillotine")).

ceeding), only if it considers this to be in the Community interest.³⁶⁰ That condition is unfortunate, particularly if a petitioner has established his interest to sue. This "Community interest" requirement is taken from the anti-dumping and countervailing duty law.³⁶¹ Weighing the interests of the Community is appropriate, as a condition to the introduction of import restrictions protecting one sector of the Community's economy to the detriment of others, such as consumers. In the context of the instrument, however, the "Community interest" requirement ought not to operate as a condition precedent to international investigations.

In the event a Community industry can show evidence that it is affected by an unlawful foreign trade restriction, one may presume that it is in the interest of the Community to investigate this complaint on the international plane. In other words, once a petitioner has established his interest to sue, the Commission ought to start international consultations and, if need be, pursue the matter through international channels. Perhaps one should not exclude the possibility of "wrong cases" filed under the instrument which the Commission does not want to formally raise before the GATT, even though the complaints have been declared admissible.³⁶² For these extraordinary cases, the "Community interest" requirement could be retained. Yet as a rule, the Commission should initiate an international investigation once a private interest to sue has been established, *unless* such an investigation would run counter to the Community's interest.

Should the Commission or the Council on appeal from a Member State, decide to discontinue the investigation, the possibility of judicial review cannot be ruled out. Admittedly, the Community authorities enjoy substantial discretion at this point. This discretion allows them to evaluate factors such as "Community interests" which can be unrelated to the merits of the petition. Such discretion, however, does not necessarily bar judicial review. Certainly this discretion would reduce the margins of the Court's review in that the Court will only consider whether the Community authorities have infringed basic principles of administrative due process.³⁶³ Even though these margins are small, the

³⁶⁰ 27 O.J. EUR. COMM. (No. L 252) 5 (1984) (Reg. 2641/84, art. 10(1)).

³⁶¹ 27 O.J. EUR. COMM. (No. L 252) 6 (1984) (Reg. 2641/84, art. 12(1)).

³⁶² The concept of "wrong cases" is described at *supra* text accompanying notes 162-67.

³⁶³ In the *Fediol* judgment, *supra* note 344, the Court related the scope of judicial review to the nature of the powers reserved to the Community institutions on the subject (recital 29). Accordingly, where the Community authorities enjoy substantial discretion, the scope of judicial review diminishes correspondingly. The Court could still inquire, though, whether the Commission, in discontinuing an investigation, had committed manifest errors of fact, had failed to take into account essential matters, or had arrived at its decision through an abuse of power which would be reflected in its reasoning (recital 30).

exposure engendered by any kind of judicial review may well exert some restraining influence on administrative behaviour.

b. Time limits

Regrettably the Regulation does not set any time limit on the conduct and conclusion of international investigations in the event that the Commission does pursue the private complaint. This not only increases the insecurity of petitioners as to the outcome of complaint proceedings, but it also weakens the Commission's hand in international negotiations. One may not favor a complete disregard of the progress of international proceedings by setting unilateral time limits across-the-board. Yet the Regulation could well have subjected the consultations which precede formal dispute settlement action to time limits.³⁶⁴ This would have been an incentive for the foreign country concerned to take these consultations seriously, in order to avoid the exposure of formal dispute settlement proceedings.

In addition, the Regulation is unclear as to when the Commission should submit its proposals for Community action to the Council. The Regulation states that the Commission should consult with the Advisory Committee on the termination of an international dispute settlement procedure. In some cases, after the GATT Council has adopted a panel report, the contracting parties are still encouraged to reach an amicable solution and may continue to consult with each other for some time. Again, the Commission's negotiating posture might be reinforced if these "post-panel" consultations were to be subjected to time limits.

Furthermore, the Regulation does not impose a deadline on the Commission to formulate its proposal for Community action to the Council, once the international consultations or dispute settlement proceedings have been concluded. The Regulation merely states that the Council shall act within thirty days after receiving the proposal from the Commission.³⁶⁵ There is no remedy or sanction such as the "guillotine" if the Council fails to act within thirty days. Besides, nothing prevents the Council from instructing the Commission to elaborate on its proposal after further consultations with the foreign country concerned.

c. Retaliation

In view of the terms of Regulation 2641/84, a private complaint against a GATT contracting party is unlikely to trigger Community re-

³⁶⁴ Recall that only the Subsidies Code subjects the consultations preceding dispute settlement proceedings to a time limit of thirty days. See Subsidies Code, art. 13(1).

³⁶⁵ 27 O.J. EUR. COMM. (No. L 252) 5 (1984) (Reg. 2641/84, art. 11(2)(b)).

taliation. The Council will only impose retaliatory measures after it has been authorized to do so by the GATT membership, and if it considers that such action is necessary for the Community interest.³⁶⁶ As noted before, the GATT Contracting Parties only once authorized a contracting party to retaliate against unfair trade practices.³⁶⁷

One of the instrument's imponderables is the likelihood and reach of retaliation against countries who are not parties to GATT. Significantly, Regulation 2641/84 merely states that retaliatory measures have to be compatible with existing international obligations and procedures. Contrary to its definition of unfairness, the Regulation does not add here that retaliatory measures have to be compatible with "generally accepted rules".³⁶⁸ Thus, it is unclear whether the Community would feel bound to litigate its claims of unfairness before an ad hoc international tribunal or even to engage in extensive consultations with a country which is not a party to the GATT before resorting to retaliation.

To sum up, once petitioners' complaints are taken up internationally, which is a discretionary decision in itself, petitioners can only wait and see. They cannot predict by any reasonable margin when the Community (or the GATT membership) will take a position on their complaint. Nor are they, unlike petitioners under Section 301, entitled to receive reports on the progress of the international investigations.³⁶⁹ Even though the petitioner is expected to draft a complaint which substantiates its allegations of the illicitness of foreign trade practices, unlike Section 301 the Regulation does not make provision for involving a petitioner in countering the arguments and rebuttals of the foreign country concerned.³⁷⁰ Presumably though, petitioners and the Commission will work closely together in practice. After some experience with the new instrument, it would be appropriate for the Commission to issue guidelines clarifying the extent of this cooperation.

4. The Instrument and the EEC Domestic Market

Much of the opposition to the new instrument centered on its protectionist bias. Yet those European industries which do seek protection

³⁶⁶ 27 O.J. EUR. COMM. (No. L 252) 5 (1984) (Reg. 2641/84, art. 10(3)).

³⁶⁷ See *supra* note 154.

³⁶⁸ 27 O.J. EUR. COMM. (No. L 252) 5 and 2 (1984) (Reg. 2641/84, *compare* art. 10(3) with art. 2(1)). Interestingly, the Economic and Social Committee had advocated that the Community should also seek settlements in trade disputes with countries which are not party to GATT. See point 5 of the preamble to its comments on the Commission proposal, *supra* note 320.

³⁶⁹ See 19 U.S.C. § 2413 (1982).

³⁷⁰ *Id.*

against unfair imports into the Common Market are likely to be disappointed if they look for import restrictions under the new instrument.

a. Foreign government practices

Assuming that a complaint under the new instrument involves a GATT contracting party, the Council will only institute countermeasures with the approval of the GATT Contracting Parties, after the unfairness of the foreign practice has been established through multilateral dispute settlement proceedings. Since the GATT membership rarely authorizes countermeasures, the protection offered by the instrument to the Community's domestic market mainly rests on the normative force of a GATT ruling denouncing the disputed foreign practice.

This does not leave European industries empty-handed in the event that they need instant protection against foreign imports. If they do need instant protection, the Community authorities could, of course, consider taking safeguard action pursuant to one of the common import regimes.³⁷¹ If such action involves a GATT Contracting Party, it need only be notified to the GATT and can be taken unilaterally.³⁷² A disadvantage for the Community would be that safeguard action may lead to requests for compensation from the affected suppliers³⁷³ and does not establish unfairness in the terms of trade of the injurious imports.

On the contrary, safeguard action presupposes that the keenly competitive imports are fairly traded. Disadvantage for the industry is that safeguard procedures presently do not admit requests for protection from private petitioners. Accordingly, the industry concerned would have to persuade its national government to intervene with the Commission, or it might approach the Commission directly.³⁷⁴ Both the national government and the Commission are free, however, to dispose of such a complaint at will.

The instrument's usefulness in protecting the EEC domestic market is limited further. Regulation 2641/84 generally is not applicable in cases covered by other existing rules in the common commercial policy

³⁷¹ *E.g.*, 25 O.J. EUR. COMM. (No. L 35) 1 (1982) (Reg. 288/82, art. 15).

³⁷² GATT, art. XIX does not require that national escape clause measures are notified to the GATT membership. If, however, an import quota has not been notified as a safeguard measure, this quota does not benefit from the suspension of the prohibition on quantitative restrictions granted by GATT, art. XIX. Accordingly, the restricting country would then be vulnerable to attack under GATT, art. XI.

³⁷³ The right to compensation of exporting countries following safeguard restrictions pursuant to GATT, art. XIX is controversial. BRONCKERS, *supra* note 216, at 28, 70 and 89-91.

³⁷⁴ See 25 O.J. EUR. COMM. (No. L 35) 1 (1982) (Reg. 288/82, art. 15). Under certain circumstances, the Member States do have authority to make emergency restrictions themselves. *Id.* at art. 17.

field, an important difference from Section 301, which does not contain this restriction.³⁷⁵ Thus, complaints which can be handled by the antidumping or countervailing duty law will not be admissible under the instrument. In this connection, note that if subsidized products originating in country A displace EEC exports to country B, the industry is able to lodge a complaint under Regulation 2641/84.³⁷⁶

What then can be expected from the instrument in respect of the EEC domestic market? The Commission has been apprised of a number of controversies which the European business community may submit under Regulation 2641/84. For example, it appears that several countries maintain a system of differential taxation. The sale of raw materials mined or manufactured in these countries is taxed with a surcharge if the sale concerns an export transaction. In this way, the domestic processing industry of those countries receives protection, because their competitors in the Community suffer a price disadvantage. Likewise, it seems that certain vertically-integrated United States corporations have agreed on relatively high minimum prices for exports outside the United States of products such as raw materials and intermediate products which they process themselves. This dual-pricing strategy gives their processing affiliates a competitive edge over their European counterparts.³⁷⁷

b. Restrictive business practices

The last example raises an important issue under the new instrument and, for that matter, under Section 301. Can restrictive business practices be attacked through these private complaint procedures? This question is not without significance, since roughly thirty percent of world trade could be classified as trade between related parties.³⁷⁸ All the same, the answer is negative, unless foreign governments become involved in private practices.

Recall that both the instrument and Section 301 are directed against foreign unfair trade practices which are attributable to foreign govern-

³⁷⁵ Compare 27 O.J. EUR. COMM. (No. 1 252) 6 (1984) (Reg. 2641/84, art. 13) with *supra* text accompanying note 203. Note that the instrument *does* operate by way of complement to Community rules regarding trade in agricultural products.

³⁷⁶ See 27 O.J. EUR. COMM. (No. L 252) 4 (1984) (Reg. 2641/84, art. 8(1)(b) (referring to third country subsidies undercutting the prices of Community producers).

³⁷⁷ These examples are drawn from an interview with Dr. Jacques H.J. Bourgeois, Head of the Trade Policy Instruments Division, Commission of the European Communities (Aug. 20, 1984). In the 1982 *Ministerial Declaration*, the Contracting Parties made provision for a study of dual pricing practices. GATT, 29th Supp. BISD 21 (1983). At the time of this writing, no report has been published.

³⁷⁸ U.N. Center on Transnational Studies, *Transnational Corporations in World Trade Development—Third Survey* 160 (1984) (quoting a 1978 UNCTAD estimate).

ments. The question then becomes to what extent public authorities must be involved in private practices before they are vulnerable to attack under the instrument. Arguably, it would not be sufficient if the foreign government refuses to intervene and condemn these restrictive practices (assuming it could do so under its antitrust laws). Yet the requisite public involvement may be present if the government does take affirmative action and approves or even compels the restrictive practices of private industries. For instance, if the United States government pursuant to the Export Trading Company Act of 1982³⁷⁹ grants antitrust immunity to the exporting industries participating in a dual pricing scheme, this action might attract an investigation under the new instrument.

Such an investigation would undoubtedly be complicated. The GATT so far has not asserted authority over restrictive business practices.³⁸⁰ Even if the GATT were to condemn this grant of immunity³⁸¹, and the United States government were to subsequently repeal the relevant certificate, it would be quite a different matter to have the United States government take positive steps and prosecute the dual pricing scheme under United States antitrust laws. The GATT's preparatory work suggests that a contracting party cannot, through an Article XXIII procedure, impose on other members positive obligations that are not contained in the Agreement.³⁸² Outside of the GATT, there appears to be no international norm which creates an obligation for national governments to challenge restrictive business practices of their constituents.

In sum, though restrictive business practices may become the target of private complaints under the new instrument and under Section 301, when government involvement can be demonstrated, it is uncertain whether such a complaint would actually succeed in attacking the root of the problems which these practices create.

5. Summary

The instrument contains quite a number of hurdles for private complainants. For instance, the admissibility requirements will not always be easy to meet. Adding a separate internal examination procedure after a

³⁷⁹ Pub. L. No. 97-290, 96 Stat. 1233 (1982). Immunity would be granted by the Department of Commerce, in concurrence with the Attorney General, in the form of a so-called "certificate of review." 15 U.S.C. § 4013(b) (1982). See generally Acheson, *The Export Trading Company Act: A Year Downstream*, 18 INT'L LAW, 389 (1984).

³⁸⁰ See Petersmann, *Protektionismus als Ordnungsproblem und Rechtsproblem* 47 RABELS ZEITSCHRIFT 478, 497-98 (1983); J. JACKSON, *supra* note 1, at 522-27.

³⁸¹ The grant of immunity might be considered to amount to a quantitative export restriction, unjustifiable under GATT, art. XX(i) and inconsistent with GATT, art. XI.

³⁸² J. JACKSON, *supra* note 1, at 181.

complaint has been declared admissible has needlessly delayed Community action. The Commission has been left with large discretionary authority to pursue or not to pursue a complaint on the international plane. Petitioners are not entitled to participate in the international investigation of their complaints. Several phases of the instrument's decision-making process are not subject to time limits.

Yet it is too soon to pass judgment on the effectiveness of this procedure. The Commission's attitude towards private complainants is as yet unknown, but may well prove to be a decisive factor in the instrument's implementation. If the Commission restrictively interprets the admissibility requirements pertaining to private petitioners, there is not much that they can do, particularly since the possibilities for judicial review of administrative decisions under the instrument appear to be limited.

Perhaps though, the Commission will go so far as to encourage private complaints by broadening private access. In order to appreciate this, one should recognize that the Commission does not enjoy independent authority to investigate and challenge unfair trade practices. It can merely act upon a complaint from a Member State or from a private petitioner. Only when it has received and admitted a complaint, is the Commission able to exercise its newly-gained authority in the international trade area.

It remains to be seen whether the Member States will bring many complaints under the new instrument. Presumably, those Member States which opposed its adoption will be disinclined to avail themselves of the instrument in the immediate future.³⁸³ Member States generally may hesitate to espouse the grievances of one of their industries and submit a complaint against a foreign government in their own name. Instead, Member States may prefer that industries file a complaint, an action which does not have the same political connotations as a government-to-government dispute.

In comparison, it is difficult to predict the number of private complaints which will be filed under the new instrument. Industries are unlikely to make the effort if they do not anticipate that the Commission will admit and investigate their complaint. It will therefore be interesting to see how the Commission handles the first private petitions.

³⁸³ Indeed, the government of the Netherlands, in an answer to a parliamentary question dated Oct. 20, 1984, emphasized that the Netherlands will only reluctantly invoke the instrument itself, and intends to critically examine complaints brought by other Member States or by private petitioners. AANHANGSEL HANDELINGEN IIe K. 141 (1984-1985).

IV. APPRAISING PRIVATE INVOLVEMENT IN THE ENFORCEMENT OF GATT COMMITMENTS

The foregoing analysis rests on the assumption that international trade policy should move from a "power oriented" to a "rule oriented" approach.³⁸⁴ From the perspective of the business community, trade policy decisions which are not guided by well-established rules, but by motives of political expedience and power, create an unpredictable commercial environment. Indeed, a recent GATT report highlighted business insecurity resulting from deteriorating trade policy discipline as a major reason for sluggish investments in export capacity during recent times.³⁸⁵

Section 301 and the new EEC instrument constitute means to increase private involvement in the enforcement of international trade agreements. They ensure that complaints will be handled carefully and in a timely manner. To a different degree, furthermore, they place responsibilities upon governments to investigate complaints of their constituents on the international level. Thus, private petitioners have the possibility to invoke and rely on the normative force of GATT commitments. In sum, private complaint procedures go some way towards protecting individual interests in international trade policy.

These procedures can contribute to the reinforcement of the GATT regime as well. Private complaints arising in the marketplace help to clarify the scope of GATT norms. They elicit governments to publicly articulate their actions and policies. Also, because government measures involving trade directly affect private petitioners, their vigilance in exposing transgressions will reinforce multilateral surveillance of GATT commitments.

As a further proposal, this article submits that the admissibility threshold of Section 301 and especially of the new EEC instrument is needlessly restrictive. Whenever private petitioners invoke GATT law and meet the requirements of an "interest to sue," the presumption ought to be that they are admissible under the complaint procedures established by Section 301 and the new EEC instrument.³⁸⁶ In particular, petitioners should not need to demonstrate injury caused or threatened by foreign unfair trade practices in a manner similar to countervailing duty and

³⁸⁴ This proposition has been developed in Jackson's pioneering study, *The Crumbling Institutions of World Trade*, 12 J. WORLD TRADE L. 93 (1978).

³⁸⁵ GATT, INTERNATIONAL TRADE 1983/1984 7-11 (1984).

³⁸⁶ The concept of an "interest to sue" in connection with private complaints about foreign unfair trade practices has been discussed at *supra* text accompanying notes 129-83.

anti-dumping investigations.³⁸⁷ The latter two instruments seek to determine whether foreign trade practices affecting the domestic market of national producers warrant import restrictions. In contrast, the primary objective of Section 301 and the new instrument should be to remove foreign barriers to trade through international normative pressure. The imposition of import restrictions as a retaliatory measure (which at that stage should be contingent upon a significant injury test) is an unlikely and undesirable outcome of these investigations.

Facilitating private access could increase the effectiveness of Section 301 and the new EEC instrument. Yet one should not expect too much from these complaint procedures in liberalizing international trade, partly because of limitations imposed by the GATT regime, and partly because of limitations connected with governmental dispute resolution.

Presumably, private complaints can be most effective if they are directed at relatively clear-cut violations of GATT commitments. These cases lend themselves to straightforward disposition in accordance with preconceived procedures. On the other hand Section 301 and the new EEC instrument appear less effective in dealing with "grey area" trade restrictions (VRAs, surveillance systems, price undertakings or export forecasts, but also industry-to-industry arrangements where the role of governments is not always clear³⁸⁸). The GATT's normative force in these areas is weak, and if invoked by petitioners, cannot be expected to bring about the removal of disputed restrictions.³⁸⁹

In other words, private complaints are best suited to reinforce commitments which enjoy a fair amount of support in the GATT membership. That objective by no means is unimportant, because the improvement of GATT's viability in areas of relative consensus is likely to reflect positively on the "grey areas". Yet private petitioners cannot hope to speed up consensus-building within the GATT on how to approach these "grey areas" by alleging violations of norms which have not crystallized yet. In these instances, the GATT membership first has to develop a modicum of consensus, at its own pace. Indeed, pressing complaints in these areas risks sharpening opposing viewpoints.

The structure of governmental dispute resolution also confines the effectiveness of private vigilance in reinforcing the GATT regime. In-

³⁸⁷ See generally *supra* text accompanying notes 144, 338-40.

³⁸⁸ These examples of "grey area" measures are taken from the interim Chairman's report on the current consultations within GATT regarding safeguard measures. GATT, 30th Supp. BISD 216, 217 (1984).

³⁸⁹ See *supra* text accompanying note 45. One should not exclude the possibility that, irrespective of or in combination with GATT principles, other bilateral norms may on occasion be helpful to private petitioners in clearing up grey area measures.

creasing the number of potential complainants by lowering the admissibility threshold creates problems of scale for the administering authorities in terms of manpower and resources. In addition, through government intervention, private complaints are converted into government-to-government disputes. Because governments probably would continue to assert that they have a measure of discretion to investigate private complaints of unfair trade practices, the incriminated government may view these investigations as an "unfriendly" maneuver. Thus, even relatively minor or unambiguous complaints attract political considerations. Although frequently unrelated to the merits of the complaint, such political concerns will influence, if not restrain, the government's pursuit of private petitions on the international plane.

The obvious way to avoid sensitizing diplomatic relations between governments is to grant private complainants the right to petition the GATT directly. So far, this idea has been an anathema, probably because of lingering suspicions that a private right of petition might transform the GATT into a supranational body. In actuality, however, private petitions could fit well into the existing GATT framework. The Tokyo Codes have established supervisory committees which might charge subsidiary bodies with the task of investigating private complaints.³⁹⁰

Once a surveillance body would have determined that the petitioner has demonstrated an interest to sue, different methods are conceivable to pursue the complaint. One could envisage, for example, that the surveillance body administer further proceedings between the petitioner and the respondent government. Yet given current political realities, it is unlikely that GATT contracting parties will agree to be confronted with private complainants before an international surveillance body.

The scope of this article does not allow an in-depth analysis of how a private petition right within the GATT framework might be fashioned. Instead, some prefatory observations are offered here with a view towards stimulating further discussion.³⁹¹ It is submitted that in order to

³⁹⁰ See *supra* text accompanying note 109.

³⁹¹ A private petition right to GATT, of somewhat different design, has been advocated recently in J. JACKSON, J. LOUIS & M. MATSUSHITA, *IMPLEMENTING THE TOKYO ROUND—NATIONAL CONSTITUTIONS AND INTERNATIONAL ECONOMIC RULES* 208-09 (1984). But see Tumlr, 8 *WORLD ECON.* (book review to be published in 1985). On this point Tumlr disagrees with Jackson, arguing that a private petition right to GATT might collide with the national judicial process. This author does not share Tumlr's concern. Enabling the individual to obtain preliminary interpretations from a GATT surveillance body may actually substantiate his allegations of GATT inconsistencies or of the irregularities under domestic trade law in national court proceedings. Even though these interpretations are unlikely to be considered binding on national authorities, and even if they are not officially recognized by the courts, they are likely to have some persuasive force.

make a private right to petition palatable to GATT contracting parties, one could build in a number of filters, both substantive and procedural.

First, legislative measures probably should be excluded from the petition right. Without the endorsement of its government, it does not seem appropriate that a private petitioner can call into question the legitimacy of trade policy measures which have passed national democratic control. The petition right should be directed primarily against administrative practices affecting international trade. Indeed, trade-restricting administrative practices which often escape judicial as well as legislative control in national jurisdictions, are chiefly responsible for what is commonly referred to as the New Protectionism.³⁹²

Second, one might exclude administrative decisions in areas which are not subject to effective GATT control (e.g. agriculture and export restrictions). In this way, the surveillance body would be saved from giving an opinion to private parties on controversial issues, an action which might tarnish its reputation. Perhaps the petition right should be further restricted to practices covered by the Tokyo Codes, because the Tokyo Codes contain relatively sophisticated rules and would appear to make provision for the institutional machinery equipped to deal with private petitions.

Third, the surveillance body should not issue rulings against contracting parties on the basis of a private complaint. Instead, it could issue non-binding "preliminary interpretations", reviewing (without independent fact-finding) the disputed practices against relevant GATT obligations. These interpretations presumably would have some normative force of their own, but would be different from panel rulings in that they would not involve the respondent party and would remain fairly abstract. For example, an interpretation could say "if such and such were factually true, then a contracting party could be deemed to have violated its commitments." By taking a rather detached view, a surveillance body would be less likely to provoke the wrath of contracting parties, which might impede its effectiveness on subsequent occasions.

Fourth, if following an unfavorable interpretation by the surveillance body, the respondent government would not eliminate or adjust the disputed practice, then the petitioner should be allowed to ask its government to intervene and request a formal ruling from the GATT Contracting Parties after a full investigation of the facts. On the other hand, if the private petitioner found a preliminary interpretation disagreeable, the petitioner's government should not be barred from raising the matter

³⁹² See, e.g., B. HINDLEY & E. NICOLAIDES, *TAKING THE NEW PROTECTIONISM SERIOUSLY* 10 (Thames Essay No. 34 1983).

before the GATT Contracting Parties. Either way, preliminary interpretations of an international surveillance body could give the disputing parties the benefit of an "expert opinion".

Fifth, the surveillance body which initially entertained the private petition should not be charged with the "full" investigation. Rather, a panel elected in accordance with GATT customs ought to investigate the complaint brought by the government of the petitioner. This would ensure an independent assessment of the facts and submissions put forward by the litigating governments.

Limiting governmental intervention to "second phase" complaints in appropriate cases might balance private participation and government discretion in surveying compliance with GATT commitments. Whatever method is chosen, in a world of proliferating trade regulation without a parallel extension of democratic control and judicial protection, involving the individual in the supervision of GATT commitments deserves a lot of thought.

POST SCRIPT

At the time this article was written (Fall of 1984), the President had never imposed retaliatory measures pursuant to Section 301. Although there was concern among United States trading partners that the President might ignore GATT obligations in applying Section 301, no such instance had ever occurred. Very recently, however, in a dispute with the European Community, the President appeared willing to retaliate without regard to GATT procedures. Although soon dubbed the *Spaghetti-War* by the press, the origin of this dispute concerned citrus products.

In a petition filed under Section 301 in November of 1976, a group of American growers of citrus products alleged that the Community's preferential (lower) import duties on orange and grapefruit juices and fresh citrus fruits from certain Mediterranean countries adversely affected United States citrus producers. Specifically, complainants maintained that the Community's preferential treatment of Mediterranean citrus products violated the non-discrimination (most-favored nation, "MFN") principle of Article I of the GATT.³⁹³

The USTR initiated an investigation, obtained some concessions on fresh grapefruit from the EEC during the Tokyo Round, but failed to achieve an overall solution to the problem presented by complainants. Finally, in 1982, the GATT Contracting Parties established a panel at

³⁹³ 41 Fed. Reg. 52,567 (1976).

the request of the United States to investigate this matter. Apparently the United States government waited this long before initiating GATT dispute settlement proceedings, because of the political importance of these preferential tariffs to the EEC.³⁹⁴

In December of 1984, the panel found unanimous that the EEC preference nullified and impaired benefits arising under the GATT with respect to United States exports of oranges and lemons, two of the eight categories of United States citrus exports affected by the Community's tariff preferences. It recommended that the EEC reduce its MFN-rate of duty on fresh oranges and lemons no later than October 15, 1985.³⁹⁵ The panel's ruling proved controversial and was not immediately adopted by the GATT Contracting Parties. Nevertheless, the USTR went ahead and proceeded to make a recommendation as to what action the President should take under Section 301, in response to the Community's preferential scheme.³⁹⁶

Thereupon, on June 20, 1985, President Reagan decided to retaliate against the Community, and to increase substantially the duties on pasta imports from the EEC (hence the epithet *Spaghetti-War*).³⁹⁷ With this decision, the President tackled two problems at once. Following another Section 301 complaint, resulting in GATT dispute settlement proceedings, a panel had ruled in 1983 that 'restitutions' granted by the Community on pasta exports did not conform with the GATT Subsidies Code. Due to resistance by the European Community, this panel report as well was not adopted by the GATT Contracting Parties.³⁹⁸

As the Community was quick to point out in the citrus dispute, the United States retaliatory measure was not authorized by the GATT Contracting Parties and therefore was inconsistent with the GATT.³⁹⁹ The EEC promptly announced it would raise import duties on imports of United States lemons and walnuts, should the increase in United States duties on European pasta products become effective.⁴⁰⁰ Of course, the Community's imposition of retaliatory duties on United States products would likewise have lacked a legal basis in GATT, not having been approved by the Contracting Parties. Hectic diplomatic negotiations fol-

³⁹⁴ Presidential Memorandum, June 20, 1985, 50 Fed. Reg. 25,685 (1985).

³⁹⁵ *Id.* at 25,686.

³⁹⁶ See 50 Fed. Reg. 15,266 (1985).

³⁹⁷ Presidential Memorandum, *supra* note 392.

³⁹⁸ See E. MCGOVERN, INTERNATIONAL TRADE REGULATION: GATT, THE UNITED STATES AND THE EUROPEAN COMMUNITY § 11.323 (1983 Supp.). The relevant Section 301 complaint was filed by the Miller's National Federation. 40 Fed. Reg. 57,249 (1975).

³⁹⁹ *U.S. Plans Tariff Increases on European Pasta Imports*, Wall St. J., June 21, 1985, at 2.

⁴⁰⁰ *E.C. May Raise Citrus Duty in Row with U.S. on Pasta*, Wall St. J., June 25, 1985, at 2.

lowed, whereupon the Community and the United States authorities reached a temporary stand-still agreement in mid-July of 1985.

The compromise solution ultimately reached consists of four elements: (1) The United States will not effectuate the retaliatory duty increase on European pasta imports; (2) the Community will not increase the import duty on United States lemons and walnuts; (3) the Community will 'unilaterally' decrease the restitutions on pasta exports destined for the United States, without thereby accepting the 1983 GATT panel disapproval of these restitutions; and (4) the United States will withdraw its GATT complaint about the EEC export restitutions on pasta products so that in effect the 1983 panel ruling will be void of interest and hence of legal force. This armistice is valid for only four months, during which period the Community and the United States will seek to negotiate a mutually acceptable solution to the citrus dispute. Failing this, each party has reserved the right to increase its respective retaliatory duties.⁴⁰¹

While it is difficult to assess the implications of the *Spaghetti War* at the time of this writing (August of 1985), before the outcome is known, certain observations can already be made. The *Spaghetti War* is not just another fascinating exercise in trade diplomacy. It may represent a shift in United States trade policy, which so far favored a resolution of disputes through diplomatic channels, in accordance with GATT and other applicable international rules. Incoming Administration officials lately have advocated a more aggressive approach to persuade United States trading partners to dismantle their trade barriers.⁴⁰² Presumably, the considerable trade deficit which the United States has been experiencing for some time has influenced their thinking, as it has affected the mood in

⁴⁰¹ Agence Europe, July 17, 1985, at 8. One of the unresolved ambiguities of this compromise solution appears to be whether the United States government would feel bound to withdraw its GATT complaint about the EEC's export restitutions on pasta products, even if no agreement is reached on the citrus dispute in the fall of 1985. In this connection, it is worth noting that the Community has already reduced the restitutions on pasta products destined for export to the United States. 28 O.J. EUR. COMM. (No. L 188) 29 (1985) (Reg. 2010/85).

⁴⁰² E.g., the remarks of the new United States Trade Representative, Dr. Clayton Yeutter, during his nomination hearings before the Senate Finance Committee, *U.S. Trade Nominee Yeutter Urges Tougher Pressure*, Wall St. J., June 27, 1985, at 2. Similar suggestions were made by Mr. Bruce Smart, the new Under-Secretary for Commerce, in discussing a major review of United States trade policy. *Washington begins review of trade policy*, Financial Times (London), Aug. 14, 1985, at 4.

Most recently, in the aftermath of his controversial decision not to grant import relief to the United States shoe industry, President Reagan initiated a spate of Section 301 actions at lowering foreign trade barriers to United States exports. Specific actions were directed against Brazil, the European Community, Japan and South Korea. At the same time, the administration reportedly was drafting amendments to Section 301, sharpening its bite in general. *Reagan Issues Complaint on Trade Partners' Practices*, Wall St. J., Sept. 9, 1985.

Congress.⁴⁰³ A more favorable trade balance which may well come about independently from the imposition of retaliatory restrictions (notably through a devaluation of the dollar⁴⁰⁴) could easily assuage such militant trends.

Perhaps though, the *Spaghetti War* signals more fundamental dissatisfaction in the United States with the prevailing international trading regime (i.e., the GATT). In that case there is cause for serious concern. If as important a trading block as the United States gradually, but effectively, distances itself from the GATT, international trade relations risk changing dramatically. Bilateralism and 'power diplomacy' may become the rule. In all likelihood, relatively weak countries would be the prime victims of such a change in trade policy.

It would be all too facile to blame the United States for a possible rupture in international trade relations. In varying degrees, many GATT Contracting Parties (including the European Community) are responsible for the mounting tensions in the GATT regime. Rather than a round of accusations, the time has come for a GATT round of negotiations which strives toward restoring confidence in multilaterally established rules and procedures concerning international trade.

⁴⁰³ More than 400 trade bills have been introduced in Congress in 1985, many aiming at protecting specific industries, or at bashing specific countries which are accused of maintaining unreasonable trade restrictions on United States exports. *America's War on Imports*, FORTUNE, Aug. 19, 1985, at 18.

⁴⁰⁴ Thus, Mr. Malcolm Baldrige, the UN Commerce Secretary, recently observed that a decrease of 20% in the dollar's value would allow United States exports to compete overseas. Bonn, "Can weather fall in \$ with ease," Financial Times (London), Sept. 25, 1985, at 8.