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DG-TRADE

Final Report

Interim Evaluation of the European Union’s Trade Barrier Regulation (TBR)

Prepared by

Crowell & Moring

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EXECUTIVE SUMMARY

The purpose of this Study is to carry out an in-depth examination of the use of the EU’s Trade Barrier Regulation over the last ten years and to make recommendations addressed to the European Commission for possible reforms of the way it is applied in practice to remove illegal trade barriers adopted or maintained by the EU’s trade partners.

We have taken into account the views of a number of stakeholders involved in the TBR processes including past users of the instrument, potential users in the form of EU trade associations and individual companies, as well as EU and Member State officials and consultants advising on the use of the instrument.

Broadly speaking, our findings are that the Trade Barrier Regulation is seen, especially by EU industry, as a necessary tool in the EU’s commercial policy instruments toolbox. On the other hand, there appears to be a number of shortcomings in its functioning and, mainly for these reasons, EU industry and enterprises have not made as much use of the TBR as might otherwise have been the case.

In our view, changes to the TBR are necessary to make the instrument more user friendly for EU industry and enterprises, and to adopt the instrument in light of the experience gained in the last decade. The views of no single group of stakeholders have been given absolute priority in determining which reforms are required. On the contrary, we have intentionally given most prominence to those areas where there has been a convergence of views among different stakeholders and participants in the TBR decision-making processes. These instances of convergence of opinions have not always embodied the unanimous view of all concerned but do share the merit of also making practical and theoretical sense.

Our recommendations have been made with a view to tackling some of the issues seen as preventing the TBR from having a wider appeal to potential users. We have not attempted to address every comment – positive or negative – about the functioning of the TBR but we have tried to explain, in most instances, why the contributions by stakeholders have been attributed the particular weight that they have been given in this project.
We have left the choice of precisely how these reforms should be implemented to the European Commission to determine. For some, legislative amendments will be required. For others, changes and modifications in European Commission practice will suffice.

This Report was prepared by the Crowell & Moring international trade team in Brussels and Washington DC and the project was led by Dr Robert MacLean. The views expressed in this Report are our own.

Crowell & Moring
Brussels and Washington DC
June 2005
**List of Abbreviations**

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>DSB</td>
<td>WTO Dispute Settlement Body</td>
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<td>DSU</td>
<td>WTO Dispute Settlement Understanding</td>
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<td>MADB</td>
<td>European Commission Market Access Database</td>
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<td>MAU</td>
<td>European Commission Market Access Unit</td>
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<tr>
<td>TBR</td>
<td>Council Regulation (EC) 3286/94</td>
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<td>WTO</td>
<td>World Trade Organisation</td>
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1. Scope of the Project

The Trade Barrier Regulation (TBR) allows industries and enterprises in the EU-25 to bring complaints to the European Commission when illegal foreign trade measures or actions are taken by the EU’s trading partners. Access to the dispute settlement procedures of the World Trade Organisation (WTO), as well as the bilateral agreements between the EU and its trading partners, is closed to private parties. The TBR was introduced to change this situation. It allows the European Commission to receive complaints from European industries which it may take up with the EU’s trading partners – with the ultimate possibility of formal dispute settlement procedures in the event that a negotiated settlement of the problem is not forthcoming.

The TBR entered into force on 1 January 1995. As an instrument of EU trade policy, the Trade Barrier Regulation itself is relatively concise – consisting of only sixteen short articles and running to eleven pages. This is a reflection of the fact that the Regulation itself is designed as an interface between EU industry and enterprises, on the one hand, and the international dispute settlement processes on the other.

Hence, the need for elaborate substantive provisions on identifying, for example, illegal obstacles to trade is largely redundant since this is an issue to be decided by reference to the rules of separate regulatory systems (either the WTO rules and/or provisions contained in bilateral agreements). The same is true for detailed provisions regulating the carrying out of investigations (“examination procedures”), the manner in which negotiations should be conducted to eradicate trade barriers and the strategy to be followed in individual cases.

Since its introduction, 24 TBR investigations have been initiated. There is now a substantial body of TBR jurisprudence and practice which permits a more thorough analysis of the instrument’s usage, as well as its successes and failures, in addressing the objectives for which it was originally created. There are a host of ways that this can be done but, consistent with the Terms of Reference for this project, the methodological approach that we have taken has been partly empirical and partly theoretical. This has featured a significant amount...
of fieldwork in order to take stock of the views of the number of important EU actors and stakeholders in market access matters in general and, more specifically, potential users of the TBR. This exercise has been carried out through direct interviews and the issuing of questionnaires to decision-makers, stakeholders and consultants involved in the use of the TBR as an instrument of EU trade policy.

First and foremost, we have actively sought the views of EU industry for this exercise and have received assistance and feedback from a number of EU and national trade associations and companies – large, medium and small. It should not be forgotten that, as an instrument of EU trade policy, the TBR is largely in the hands of EU industry and enterprises to activate. It was, and remains, the intention of the European Union to put European businesses firmly in the driving seat as far as the triggering of TBR action against third countries is concerned. As former EU Trade Commissioner Pascal Lamy stated, when addressing EU industry at the last European Commission Market Access Symposium, “on market access, our agenda, roadmap and priorities are very much determined by you.”3 The TBR represents one of the main EU instruments for improving market access.

How EU industry perceives the TBR as a market opening tool is therefore an extremely important aspect of this project. European industry and businesses are best placed to say which illegal obstacles to trade are significantly hampering their access to third country markets. By empowering EU industry in this way, action under the TBR should be matched to counter the most damaging illegal obstacles to trade faced by EU industry in the global market-place.

The views of EU industry cannot, of course, be the sole driver for reform and/or review of the TBR. The opinions of other stakeholders, decision-makers and interested parties must also be taken into account. For this reason, the observations of officials in the European Commission with responsibility for related trade policy issues have been sought, as well as comments from representatives of EU Member State governments, and other important international trade operators in addition to the views of trade practitioners.

Theoretical evaluation has been carried out mainly by analysing past TBR cases and specific complexities that have been raised, especially from the perspective of the solutions that have been achieved. The views of Commission officials and certain EU member state officials
and representatives have been especially helpful in this context. We have tried not to dwell on the historical background in which the TBR came into existence but rather the way that it has evolved.

This evaluation has not been carried out in isolation from other related aspects of EU trade policy and, notably, the EU’s Market Access Strategy as it has involved in parallel with the TBR over approximately the same period of time. Although having a more general character, and taking the form of a policy initiative rather than a legal formal instrument, the Market Access Strategy shares many common objectives to those pursued by action under the TBR. This interaction cannot be ignored in the evaluation of the performance of the TBR over the last decade.

Equally, where appropriate, we have also looked at principles and concepts embodied in other EU trade policy instruments, specifically the EU’s anti-dumping and anti-subsidy laws, to provide a point of comparison for the TBR’s procedures and concepts.

Based on this analysis, we have presented our recommendations for enhancing the effectiveness of the TBR. These are founded on a number of themes, the most important being the adaptation of the TBR to the needs of potential EU users facing illegal obstacles to trade in their attempts to expand into third country markets. At the same time, it must be recognised that the TBR is a legal instrument which embodies standards and procedural requirements for triggering action which balance the needs of users against the general trade policy interests (and available resources) of the European Union. For example, resort to the TBR is simply not feasible when there is no violation of the globally-agreed international rules and it cannot be in the EU’s interests to unfairly coerce its trading partners when such infringements simply do not exist.

The concepts and procedures embodied in the TBR must strike a balance between these elements. The TBR must not be so cumbersome or onerous as to unreasonably discourage complaints by EU industries and enterprises. On the other hand, the TBR must not be held out as a panacea for all market access problems faced by EU industry. Hence, there is a sensitive and delicate balance to be struck in any review process examining the instrument’s performance.
Our recommendations have been made both regarding the legislative framework in which the TBR functions as well as the accumulation of experience over the last decade. Not all suggestions, comments and criticisms have formed the basis for these recommendations. This is particularly true of isolated instances of observations confined to specific TBR investigations. Where possible, we have tried to explain in this Report why these views and perceptions have not been incorporated into the final recommendations.

Conversely, where we have heard consistent themes, especially from different groups of EU stakeholders, participants in the TBR decision-making processes and/or other interested parties, we have taken notice and formulated appropriate recommendations to address them. In other cases, feedback from interested parties, although not always widely-expressed or shared, has had such compelling logic and merit from both a theoretical and practical point of view, that it has also formed the basis for recommendations.

We have tried to draw these themes together in a comprehensive and consistent way throughout this Report and in the recommendations for improvement that we have put forward to the European Commission.
2. How the TBR Works to Solve Trade Problems for EU Industry

1. Access to the Trade Barrier Regulation

There are three routes for getting a TBR complaint started with the European Commission to tackle illegal trade barriers and practices.

<table>
<thead>
<tr>
<th>Routes for Lodging a TBR Complaint</th>
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<tr>
<td>• Track 1: Trade Barriers with an Effect on Export Markets</td>
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<tr>
<td>• Track 2: Trade Barriers with an Effect Inside the EU Market</td>
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<tr>
<td>• Track 3: Referral by a Member State of a Trade Barrier</td>
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</table>

EU Member States automatically have standing to bring TBR complaints. EU industries and enterprises, on the other hand, have to satisfy more rigorous conditions for their complaints to be accepted.

**First Track: Trade Barriers in Export Markets**

Private companies and firms formed under the laws of one of the 25 EU Member States can lodge a complaint as long as the company or firm is directly concerned in the production of goods or the provision of services affected by the obstacle to trade. A complaint can also be made under this procedure by any association, with or without legal personality, acting on behalf of one or more EU enterprises.

<table>
<thead>
<tr>
<th>Summary of EU Enterprises Entitled to Lodge TBR Complaints</th>
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<tr>
<td>• Individual Companies and Firms or Groups Thereof</td>
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<tr>
<td>• Associations Representing Enterprises in Individual Member States</td>
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<tr>
<td>• Associations Representing Enterprises in Specific Geographical Areas</td>
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<tr>
<td>• Associations Representing Specific EU Industry Sectors</td>
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</table>
A complaint under this track can be lodged by an individual EU enterprise or association acting on behalf of such entities if they have suffered adverse trade effects arising from obstacles to trade which prevent proper access to the market of a third country (i.e. a non-EU country). Under this route, only trade barriers that infringe the international trade rules, as laid down in multilateral or plurilateral agreements (which means essentially the WTO rules), can be challenged. Infringements of bilateral trade agreements between the EU and its trading parties cannot be relied upon for action under this track.

**Second Track: Trade Barriers with Effect Inside the EU Market**

Any natural or legal person, or any association not having a legal personality, may lodge a TBR complaint under the EU industry procedure if it is acting on behalf of an EU industry. This procedure has been designed to allow EU industries facing illegal competition in the EU market-place from foreign goods or services to take steps to limit this injury by using the TBR.

EU industries may complain about infringements of two types of international trade rules. In common with EU enterprises, they can complain about infringements of obligations contained in multilateral and plurilateral agreements. At the same time, they can also raise violations of bilateral trade agreements between the EU and its trading partners, if these infringements are the source of their injury.

Special rules have also been established to allow regional EU industries to lodge TBR complaints. Producers or providers of services within a particular geographical region of the EU may be considered as an EU industry if their collective output constitutes a major proportion of the output of the products or services in question in the Member State(s) within which the region is located, provided that the effect of the obstacle to trade is concentrated in this area.

**Third Track: Member State Referral Procedure**

Member States are privileged applicants under the TBR complaints procedure and are *ipso facto* presumed to satisfy the standing requirements imposed under the TBR. Also, the evidential requirements imposed on Member States are considerably lower than those imposed on private party complainants.
2. What is an Actionable Obstacle to Trade

In the TBR, the term “obstacle to trade” is used to describe a trade barrier that can be challenged by an EU industry or enterprise. An obstacle to trade is any trade practice or measure adopted or maintained by a third country that is legally incompatible with the international trade rules.

Obstacles to trade that are actionable under the TBR have one feature in common, namely that their existence can be attributed to action, or lack of action, on the part of the competent governmental authorities, or its agencies, in another country. As long as the measure or practice in question can be attributed to the government of a third country or its agencies, it may be the subject of a complaint, assuming of course that the practice in question fails to comply with the requisite standards under the international trade rules.

The appropriate point of reference for establishing whether or not an obstacle to trade is illegal is normally the WTO rules but, in the case of complaints by EU industries, this may also be the rules established under a bilateral trade agreement which the EU has entered into with a third country.

The scope of potential obstacles to trade is wide. On the one hand, it includes the traditional kinds of trade barriers that countries use to prevent or obstruct the importation of goods, normally through measures that unjustifiably discriminate between EU and domestically-produced goods. Other kinds of practices are more subtle, less obvious, but still illegal and open to challenge under the TBR.

<table>
<thead>
<tr>
<th>Traditional Trade Barriers</th>
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<tr>
<td>Customs laws that unlawfully penalise imported products through manipulation of the customs clearance procedures</td>
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<tr>
<td>Export restrictions and/or prohibitions</td>
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<tr>
<td>Discriminatory internal taxation measures which penalise EU products</td>
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<tr>
<td>Unfair technical standards that favour domestic producers such as labelling, testing, market authorisations, etc</td>
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<tr>
<td>Unlawful subsidies to stimulate exports either in the EU or in the global market-place</td>
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<tr>
<td>Abuse of trade defence instruments like anti-dumping and/or anti-subsidy laws or safeguards</td>
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Since the WTO was formed ten years ago, a number of additional international trading rules have been created which regulate new areas of global trade.

<table>
<thead>
<tr>
<th>New Kinds of Trade Barriers</th>
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<tr>
<td>▪ Restrictions on the right of European companies to provide their services abroad</td>
</tr>
<tr>
<td>▪ Failure to properly protect intellectual property rights (i.e. patents, copyright, geographical indications, etc)</td>
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<tr>
<td>▪ Measures which erode trade-related investment</td>
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### 3. Injury and Adverse Trade Effects

The existence of an actionable obstacle to trade is not, in itself, sufficient to justify a TBR complaint being made by an EU industry or enterprise. It must also be shown that either injury or adverse trade effects are being caused to the complaining industry or enterprise for a complaint to be admissible. The primary purpose of this requirement is to act as a filter to ensure that complaints are not brought by complainants who in fact have no substantial interest in securing the removal of a particular trade barrier. Hence, valuable EU resources are not wasted on pursuing TBR complaints that have no commercial point.

In the case of an obstacle preventing exports to a third country, it is necessary to show that the measure or practice in question is causing “adverse trade effects”. For obstacles to trade having an impact inside the EU market, the standard is different, namely that the measure or practice causes injury to the relevant EU industry.

#### Trade Barriers in Export Markets: Establishing Adverse Trade Effects

EU enterprises claiming that an actionable foreign trade barrier is blocking their access to a foreign market must show adverse trade effects. Adverse trade effects are the effects which an obstacle to trade causes, or threatens to cause, in respect of a product or service, to EU enterprises in the market of any third country, and which have a material impact on the economy of the EU, an EU region or a sector of economic activity within the EU.8
Adverse trade effects arise in situations in which trade flows concerning a product or service are prevented, impeded or diverted as a result of an obstacle to trade. Equally, they may arise in situations in which obstacles to trade have materially affected the supply of inputs (e.g. parts, components and raw materials) to EU enterprises. A number of factors are examined to assess whether the normal patterns of trade have been distorted.

Trade practices which effectively obstruct EU exporters from selling their products in third country markets, because they prohibit them or render them too expensive to make, may distort normal trade patterns. For example, it may be that the trade practice in question imposes limitations on the volume of exports that would otherwise be expected to be exported into the market of the third country. Increased costs incurred by EU exporters as a consequence of a trade barrier also contribute to distorting trade patterns by reducing volumes of products that can be sold in the markets of third countries.

Adverse trade effects suffered by an individual EU enterprise are not necessarily sufficient in themselves to justify a finding that the Commission should proceed with a TBR investigation. The adverse trade effects must have a wider impact on the European Union and this impact must be material.

**Trade Barriers with Effect Inside the EU Market: Establishing Injury**

Where a complaint is made on behalf of an EU industry, the complaint must contain sufficient evidence of the existence of the obstacles to trade and of the injury resulting therefrom. Injury is any material injury which an obstacle to trade causes or threatens to cause, in respect of a product or service, on the EU market.\(^9\) The TBR contains a list of factors that are examined to establish whether injury exists.\(^10\)

The TBR also envisages the possibility of preventing damage being done to an EU industry in the future by allowing complaints to be lodged that pre-empt injury. In order to avail itself of this possibility, an EU industry must demonstrate that there is a threat of injury which is likely to subsequently develop into real injury.\(^11\)
Showing a Causal Link

Both adverse trade effects and injury must be sustained as a result of the obstacle to trade that is referred to in the TBR complaint. In other words, it must be shown that there is a link between the measure in question and the adverse trade effects or injury being sustained.

In the case of complaints relating to trade barriers in export markets, a complaining EU enterprise must also show that the obstacle to trade has effects which extend beyond its own commercial interests and have a material impact on: (a) the economy of the EU; (b) a region of the EU; or (c) a sector of economic activity in the EU.

4. EU Interest Requirement

The EU incorporates a type of safety valve in its main commercial policy instruments, including the TBR. Before adopting steps to counter actionable obstacles to trade, such action must be considered as being necessary in the interests of the EU in order to ensure the exercise of the EU’s rights under the international trade rules.

5. Summary of the Procedural Process

Once a TBR complaint has been formally lodged with the European Commission, the Commission is required to reach a decision on whether or not to initiate an investigation (called an “examination procedure”) into the allegations made normally within 45 days of the lodging of the complaint. The purpose of this 45 days period is to allow the European Commission to confirm that the complaint contains adequate evidence of the existence of actionable obstacles to trade and the adverse trade effects or injury that is being caused. In other words, the complainant must establish that it has a prima facie case and the Commission normally has 45 days to make this assessment.

A: Publication of a Notice of Initiation

The formal aspects of the procedure start with the publication of the Notice of Initiation in the EU’s Official Journal. The TBR itself sets out the basic information that must be contained in the Notice including the definition of the relevant product or services, the country concerned
and a summary of the information received relating to the obstacle to trade.

**B: The TBR Examination Procedure**

Once the Notice of Initiation is published, the examination procedure is started which is effectively the investigation into the allegations made in the complaint. The Commission must notify the representatives of the countries concerned by the TBR procedure and, if appropriate, offer the possibility of negotiations or consultations. The Commission is authorised to seek all information necessary from EU economic operators involved in the product or service concerned.

**C: Opportunities to Express Views**

Concerned parties are normally given 30 days from the publication of the Notice of Initiation to register their interests in the procedure with the Commission. Such a request must be made in writing and the request itself must demonstrate that it is made by a party primarily concerned by the results of the procedure.

**D: Preparation of an Examination Report**

When it has concluded its investigation, the Commission is required to report its findings to the TBR Committee in the form of an examination report. This report should normally be presented within five months of the initiation of the procedure unless the complexity of the examination is such that the period should be extended to seven months by the Commission.

**6. Negotiating Settlements**

The European Commission has repeatedly emphasised that the overriding objective of the TBR is to remove obstacles to trade as quickly and as efficiently as possible. Flexibility is incorporated into the TBR to allow negotiated settlements to be reached prior to any formal dispute settlement procedures being initiated. There are two ways that negotiated settlements can be reached:

- Action on the part of a country to take satisfactory measures to eliminate the obstacle to trade; and
• The negotiation of a formal international agreement between the EU and the third country to achieve the removal of the obstacle to trade.

Bilateral negotiations can be opened by the Commission with a view to resolving the matter with the proper authorities of the third country. These negotiations can lead to an undertaking from the relevant governmental authorities being accepted or, alternatively, a formal agreement being negotiated to settle the matter.

Where efforts to achieve a negotiated settlement prove fruitless, the EU may initiate formal WTO or bilateral dispute settlement procedures to remove any obstacle to trade found to exist after a TBR examination procedure. The first step on the road to starting WTO proceedings under the TBR is for the Commission to adopt a decision authorising the commencement of WTO action. There is no time limit prescribed in the TBR for the period between the finalisation of the Examination Report and the decision to start WTO dispute settlement procedures (or indeed the exercise of any of the other options provided in the TBR). A summary of the WTO process is set out in Annex A.

7. Countermeasures

In some situations, countries maintaining obstacles to trade refuse to remove the offending obstacle to trade even after the WTO has ruled against them. Under the TBR, the EU has the power to retaliate in order to sanction non-compliance. These sanctions are described in the TBR as “commercial policy measures”.

Where the EU finds, after the examination procedure has been completed, that action is necessary in the interests of the EU in order to remove the injury or adverse trade effects resulting from an obstacle to trade maintained by a third country, the appropriate countermeasures or sanctions may be adopted in accordance with the procedures set out in the TBR.

Three forms of retaliation are expressly recognised in such circumstances:
### Forms of Retaliation under the TBR

- The suspension or withdrawal of any concession resulting from commercial policy negotiations.

- The raising of existing customs duties or the introduction of any other charge on imports.

- The introduction of quantitative restrictions or any other measures modifying import or export conditions or otherwise affecting trade with the third country concerned.

Such action can only be taken after the EU has discharged its own international obligations under the DSU including the exhaustion of the appeals process.
THE TBR PROCEDURE IN SUMMARY

Submission of complaint to the European Commission

Admissibility review (normally 45 days)

Initiation of Examination Procedure (Notice published in Official Journal of the European Communities)

EU examination procedure (5 to 7 months):
- The Commission sends questionnaire to the parties and governments concerned
- Possible visits to the premises of the parties concerned
- Parties concerned by the results of the procedure may register their interests in the procedure (within 30 days from publication of Notice)

Report to TBR Committee

Commission Decision to initiate WTO DSU processes (no deadline)

Commission requests WTO consultations (no deadline)
3. The Interface Between the TBR and the EU’s Market Access Strategy

1. What is the EU’s Market Access Strategy?

The EU was quick to recognise that the creation of the WTO represented a significant commercial opportunity in the form of improved market access to third country markets for its exporters of goods, services, investment and ideas. By February 1996, the European Commission had already issued its Communication on The Global Challenge of International Trade: A Market Access Strategy for the European Union. At the heart of this important document was a simple philosophy: EU firms had become exposed to a much greater degree of competition than before as a direct consequence of the coming into being of the WTO. Hence it was only fair they should have the opportunity to compete on equal terms, especially in foreign markets, and that they should not be hindered from doing so by foreign trade barriers.

The Strategy itself is a policy initiative rather than a formal EU legal instrument like the anti-dumping or anti-subsidy laws, or indeed the TBR itself. On the other hand, the TBR shares much of the overall ambitions of the Market Access Strategy, namely the removal of illegal barriers to trade impeding EU industry from improving its export performance. The Strategy is intended to bring forth reactions from European business and other interested parties so as to allow the EU to enhance its market access approach and achieve more effective EU action to ensure that its trading partners comply with their international commitments. The Market Access Strategy did not envisage the creation of any new commercial policy instrument and was not one itself.

The Market Access Strategy has, of course, continued to evolve over the last nine years as indeed has the TBR. Other EU trade policies also have an impact on the shape and direction of the MAU including, of course, the policy on external trade and competitiveness being pursued as part of the Lisbon agenda. The four essential goals have, however, remained constant, namely:
- The EU’s trading partners should effectively adhere to and comply with the numerous and complex obligations arising out of the agreements covered by the WTO.

- Trade policy instruments should contribute fully to the longer term objective of the viability of the EU’s economy through the achievement of proper access to third country markets.

- There are too many areas where the rules of the game do not exist or are insufficient and the EU must contribute to, and indeed actively promote, the establishment of these rules.

- Business needs to be informed about the possibilities offered by existing instruments to press for the reduction of trade barriers and to contribute to trade promotion, as well as of trade policy instruments aimed at protecting the EU against unfair trade practices such as dumping or export subsidies.

Drawing these themes together, the Market Access Strategy, in its current form, functions in three dimensions. First, it is an information-gathering exercise whereby the EC Commission collects information on barriers to trade in third countries and keeps a comprehensive and interactive public record in order to scrutinise obstacles to trade in goods and services. Second, this information resource serves EU exporters through practical operational measures and allows them to obtain information concerning difficulties that may be encountered when trading with third countries. Finally, the Strategy includes action to eliminate trade barriers and ensure that the EU’s trade partners comply with their international commitments.18

To implement the Market Access Strategy, the Market Access Unit was formed inside DG-Trade of the EC Commission in 1996. Initially this was staffed by a small team although over time the number of officials working inside the Unit has grown considerably.

A: Information Gathering and Other Operational Measures

To date, the most visible action of the MAU has been the creation of the Market Access Database (MADB) listing trade barriers encountered by EU industries when exporting to non-EU countries.19 Council Decision
98/552/EC of 24th September, 1998 provided a new definition of the activities to be performed in the execution of the Market Access Strategy which emphasises the information-gathering aspects of the project in the following terms:

- Identification and analysis of market access barriers in third countries;
- Establishment and development of databases, as well as coordination and dissemination of information concerning trade barriers and international or national trade regulations;
- Preparation of studies concerning, in particular, the implementation by third countries of their obligations under international trade agreements, or otherwise relevant in connection with the preparation of negotiations; and
- Organisation for business of seminars and other similar forums, production and distribution of studies, information packs, publications and leaflets concerning any legal or economic aspect relating to the removal of trade barriers.

In addition, a Market Access Advisory Committee was also established by the same Council Regulation and is composed of representatives of all the EU Member States and chaired by the European Commission.

The MADB has been created through extensive consultations and dialogue with relevant industries. Allegations of foreign measures impeding international trade are verified and, where necessary, evidence to corroborate these allegations is collected. The interactive MADB provides information concerning export and investment conditions in non-EU countries, duties and taxes applicable in these countries, import procedures and documents required for the import of a particular product, overview of trade flows between the EU and its trading partners and reports concerning market access related studies.20

It is important to stress that these trade barriers are not only illegal measures on the part of the EU’s trading partners but also legal, but unfair or trade-restrictive, measures. A legal analysis of these kinds of measures is not necessarily or invariably carried out before being included in the database.
Compilation of the MADB has been an immense project. Reports have been prepared for around ninety of the EU’s trading partners, both WTO members and non-members. In the case of many of the EU’s trading partners these reports are extensive and contain fiches with problem-specific information. Publication of these reports on the Internet has provided a two-way communication system which has helped the Commission gather this information and keep it regularly updated.

The MADB has greatly increased the Commission’s ability to follow up complaints from business about trade barriers in foreign markets, to monitor trading partners’ compliance with their international commitments and to define the EU’s trade policy objectives in the framework of WTO and bilateral free trade negotiations.

**B: Actions to Improve Market Access for EU Exporters**

As far as the *Commission’s Communication on the Market Access Strategy* indicates, neither the Market Access Strategy nor the Market Access Unit was intended to have solely a passive information gathering role. On the contrary, it was envisaged that “[the EU’s] trade policy instruments should contribute fully to the longer term objective of the viability of the EU’s economy through the achievement of proper access to third country markets.”

A series of trade instruments, techniques and other methods for achieving the removal of foreign barriers to trade was identified as being capable of being brought to bear in order to reduce obstacles facing European exporters of goods and services. The approach to be preferred depends on a number of factors, but the possibilities included the following:

- The Trade Barriers Regulation;
- The WTO dispute settlement procedures;
- The WTO accession negotiations;
- The negotiations in the framework of the Doha Development Agenda (DDA);
- The EU enlargement negotiations;
- Implementation of existing bilateral agreements and negotiation of new ones;
- Other trade consultations and agreements.
a) **The Trade Barrier Regulation**

At the time of the introduction of the Market Access Strategy, the TBR itself was a fledgling instrument. Since the objectives of the two are complementary, but not identical, it was reasonable to partially integrate the TBR into the Market Access Strategy. The TBR should fit coherently and in a complementary way into the Market Access Strategy. However, there is no suggestion in the Commission’s *Communication* that the TBR should fall exclusively within the control of the Market Access Strategy. On the contrary, there are clear indications that the two should function independently.

b) **WTO Dispute Settlement Proceedings**

Since the introduction of the WTO dispute settlement procedure, the EU has initiated more than sixty requests for consultations with its trading partners to eliminate barriers to trade. It has requested formal WTO panels in around two-thirds of these cases. Within the Commission, these requests have been initiated through one of two procedures, both of which are available to remove trade barriers under the programme: namely, the TBR and the so-called 133 Committee procedure.

c) **WTO Accession Negotiations**

The WTO accession process presents the EU with an opportunity to remove barriers to trade by extracting commitments from the applicant countries during the accession negotiations. This option is, of course, diminishing in importance as more countries join the WTO; most recently, for example, China and Taiwan. Few of the EU’s trading partners still remain outside the WTO system, the most notable being Russia, Saudi Arabia and the Ukraine which are in the course of applying for membership of the WTO. The EU has already concluded its bilateral WTO accession negotiations with all three of them.

d) **Negotiations in the Framework of the Doha Development Agenda (DDA)**

The “*Doha Round*” of WTO multilateral trade negotiations launched in November 2001 provides the EU, and European industry, with an opportunity to negotiate the removal of unfair or burdensome obstacles to trade and improve market access. The mandate for the negotiations includes both multilateral negotiations on the improvement of various
existing WTO rules as well as bilateral negotiations on country-specific commitments for goods and services.\textsuperscript{22}

After negotiating difficulties following the WTO Ministerial Conference in Cancún, Mexico, in October 2003, discussions on the final agreement were delayed. The 2004 July Package helped to put the negotiations back on track and the next WTO Ministerial Conference will now be hosted by Hong Kong in December 2005.

e) \textit{The EU Enlargement Negotiations}

This option for action has, to a considerable degree, become more restricted with the accession of 10 new countries to the EU, some of which were important medium-sized EU trading partners. The external trade barriers that existed between the previous 15 EU Member States and the new members before accession were consequently – in principle – abolished. Possible remaining barriers between the previous and the new Member States are now to be tackled by way of internal EU processes, such as recourse to judicial procedures in the European Courts in Luxembourg.

Hence, while this option remains available, it is a largely diminished and less important one in contrast to the possibilities that were open when the Market Access Strategy was launched.

f) \textit{Implementation and Enforcement of Bilateral Agreements}

The EU has spent considerable time and energy building up an extensive network of bilateral agreements (Free Trade Agreements, Customs Union Agreements, Co-operation and Partnership Agreements, Mutual Recognition Agreements, sector or issue-specific agreements, etc.) with various countries. Some of the most obvious ones are the Free Trade Agreements between the EU, one the one hand, and Mexico, Chile and South Africa respectively, on the other. Also, there are the Partnership and Cooperation Agreements (CPA) with Russia and Ukraine and the Association Agreements with the Mediterranean countries.

Most of these agreements contain provisions for dialogue and consultations relating to matters falling within their scope, including trade dispute issues. The wide range of bilateral agreements therefore gives the EU a number of options to pursue the eradication of barriers maintained by its trading partners.
The EU is also negotiating new bilateral trade agreements with strategic trading partners, for example the Free Trade Agreement between the EU and Mercosur (comprising Brazil, Argentina, Paraguay and Uruguay), the Free Trade Agreement between the EU and the Gulf Cooperation Council (GCC), and the European Partnership Agreements with the African, Caribbean and Pacific (ACP) countries. The removal of obstacles to trade can be tackled in this context.

\(g\) \textbf{Other Options}

Where the EU does not maintain a comprehensive bilateral trade agreement with a trading partner, two-way consultations and negotiations may be possible through other means such as diplomatic channels, \textit{ad hoc} consultation meetings or the procedures prescribed in sector or issue-specific agreements.

For example, the EU and the US maintain bilateral contacts under the EU-US Transatlantic Agenda (NTA)\textsuperscript{23}, one of the objectives of which is to promote bilateral negotiations to reduce or eliminate tariffs in industrial products and to remove regulatory and other obstacles to trade. Similarly, the Transatlantic Economic Partnership (TEP) Action Plan\textsuperscript{24} also identifies actions for regulatory co-operation such as implementation of jointly defined general principles and guidelines and definition of areas where co-operation could be expanded or newly established. Both these instruments have been used by the EU to achieve the removal of barriers to trade which impede EU exporters. Following a decision at the EU-US Summit 2004 to further strengthen the economic partnership, widespread consultations with stakeholders took place on both sides and a joint EU-US Declaration of the “EU-US Initiative to Enhance Transatlantic Economic Integration and Growth” was adopted at the EU-US Summit in June 2005.

Comparable dialogues exist between the EU and Japan. Similarly, since the Transatlantic Declaration in 1990, the EU and Canada have regular summits on a wide range of political and economic issues. The cooperation has since been further developed by the EU-Canada Action Plan in 1996, the EU-Canada Trade Initiative (ECTI) in 1998, and the on-going negotiation of a comprehensive Trade and Investment Enhancement Agreement (TIEA) initiated in May 2005. Issues raised in the context of the Market Access Strategy have been taken up by officials at these meetings.
C: A Barrier Removal Initiative under the Market Access Strategy?

The EU Commission’s *Communication on Market Access Strategy* clearly endorsed a pro-active barrier removal programme to promote greater market access for EU exporters of goods, services and investment as an integral part of the Strategy.25 This “crucial phase” implied, in particular:

- Establishing priorities among these problems, on the basis of their relative importance, the likelihood of their elimination and the resulting economic benefits;

- Comparing such priorities with the available means and instruments of action;

- Choosing the approach to be taken and those instruments and opportunities to be used; and

- Setting a timetable for the execution of remedial action.

This aspect of the Market Access Strategy appeared to move forward with the announcement of the “Barrier Removal Programme”,26 which was endorsed by the Council of Ministers on 21 June, 1999.27 This programme involved three components: (i) identifying the most injurious foreign trade practices and distinguishing high priority barriers from less important ones; (ii) selecting the most appropriate procedure to achieve the removal of the most damaging trade barriers; and (iii) follow up action to ensure that the eradication action is completed successfully.28 The Commission, in liaison with the Article 133 Committee, was tasked with carrying out these functions.

The Barrier Removal Programme does not appear to have been implemented with the original intended vigour for a number of reasons and, as a consequence, the Market Access Strategy continued to develop mainly along the “information gathering and analysis” path that was one part of the whole project.29 The role of the collection and dissemination of information concerning trade barriers via the Market Access Database seems to have taken precedence somewhere shortly after 1999 as the priority for the Market Access Unit.
There appear to be both political and technical reasons for this change of emphasis. At the political level, other trade policy objectives were given more attention and energy, including the WTO Doha Development Agenda and the Everything But Arms Initiative. This change of priorities after 1999 certainly had an impact on the profile of the Market Access Strategy, a situation observed by many EU industry associations.

From a technical perspective, the Barrier Removal Programme was perhaps too ambitious in scope and full implementation would have required significant resources. Originally 670 barriers to trade were identified for action under the programme out of more than 1,000 listed on the Market Access Database at that time. Progress was made in approximately 35% of these priority obstacles in the form of the problem either being solved or significant progress reported by the EU industries concerned. Recognising the dangers of “limited EU resources being spread too thinly over such a wide range of activities”, both the Commission and the 133 Committee decided to “concentrate resources [in 1999 and 2000] on efforts to solve a limited number of cases on which we can reasonably expect to achieve results in the near future and to the greatest possible economic benefit.”

The contraction of proactive aspects of the Barrier Removal Programme, combined with the expansion of the activities of the Market Access Unit in relation to its information gathering and analysis roles, define the shape of the Market Access Strategy today. That is not, of course, to say that this situation will not change in the near future.

2. The Role of the TBR and the Market Access Strategy

Two aspects have been examined regarding the relationship between the TBR and the Market Access Strategy, namely how the present interaction functions in practice and whether any recommendations could be derived, particularly in light of the views of EU industry, as to how this interface could be improved.

A: The TBR as an Option Available Under the Market Access Strategy

The TBR was expressly identified as one of the options available to remove identified barriers to trade under the Market Access Strategy. Unlike the other alternatives, the TBR is a formal EU Commercial Policy
Instrument and can be distinguished from some, or all, of them for a number of reasons.

First, alone among these choices, the TBR requires a formal complaint, meeting specified requirements, to be lodged with the EU Commission before action can be taken. Although it can be triggered by an EU Member State, it cannot be activated by the Commission without the initiative being taken by an EU industry or enterprise. Second, only the TBR creates EU rights for private parties acting as complainants to see action taken within a prescribed framework, assuming they are able to lodge an admissible complaint. Thirdly, the TBR is designed to tackle existing and illegal foreign trade barriers. Many of the other options available are intended to tackle obstacles to trade that are not necessarily illegal under the existing international trade rules but which can be rendered illegal through future negotiations (for example WTO accession negotiations and the DDA negotiations).

The TBR therefore fits in alongside these other options to the extent that it helps to provide more comprehensive options than would otherwise be available. Inclusion of the TBR in the range of options available to pursue the removal of trade barriers under the Market Access Strategy does not undermine its continuation as an independently functioning EU Commercial Policy Instrument. It is not the case that the TBR is placed under the exclusive control of the Market Access Unit. On the contrary, it simply means that the Market Access Unit is one more potential source of referral business for the TBR team.

It would only be if the TBR was brought under the exclusive jurisdiction and control of the Market Access Unit that the essential character of the TBR could be threatened. Since this is not the case, it is difficult to see how the present positioning of the TBR as one of the range of multiple options available under the Market Access Strategy could undermine its efficiency or availability as a remedy for EU industries or enterprises wishing to pursue action against an actionable obstacle to trade maintained by a third country. This is especially so since, as the situation stands at present, EU industries and enterprises do not need to pass through the Market Access Unit in order to avail themselves of the remedies potentially available under the TBR. They can (and sometimes do so), but this is not a prerequisite and, to this extent, the Market Access Strategy and the TBR are complementary.
B: The Internal Relationship Between the TBR Team and the MAU

Both the Market Access Unit, which is responsible for the implementation of the Market Access Strategy, and the TBR team are located inside DG-Trade of the European Commission. The MAU (Unit E.3) and the TBR team (Unit F.2) report to different Directors although obviously both are ultimately responsible to the same Director-General. Unit F.2 itself (Dispute Settlement and Trade Barriers Regulation) is composed of Commission officials and experts who deal with WTO dispute settlement cases as well as TBR complaints.

The question is whether the current internal juxtaposition of the MAU and the TBR team inside DG-Trade is the most effective way of maintaining this relationship or if some other internal repositioning is desirable. In investigating this issue, we sought the views of EU industry trade associations, individual enterprises, trade practitioners as well as EU and national officials involved in the operation of the TBR. Four strong and consistent themes emerged from this research:

- The TBR team should continue to function independently inside the European Commission in its current institutional location.

- The Market Access Unit should be promoted by the European Commission as the main but non-exclusive contact point for dealing with enquiries from EU industry and enterprises regarding market access problems – including the use of the TBR.

- The Market Access Unit should not perform this role in a way that might unduly limit or restrict EU industry and enterprise from contacting other units (especially DG-Enterprise, DG-Agriculture and the country desks inside DG-Trade) on market access problems.

- Internal communication inside the European Commission as a whole (not just DG-Trade) should be improved in order to help the Market Access Unit act as a “centre of gravity” or “magnet” for assistance on removing foreign trade barriers.

Externally (i.e. outside the European Commission), those parties expressing their views are looking for a single principal point of contact for market access problems to point them in the right direction...
to seek assistance in resolving market access problems. This should be complimented by steps taken internally inside the European Commission (as a whole) to ensure that market access issues eventually flow to the same point of reference. This process should not be to the exclusion of the input of other parts of the Commission’s services that have special knowledge or insight as to the functioning of specific industries and economic sectors and which can also lend assistance and/or expertise.

The TBR team should nevertheless continue to be an independently functioning entity, capable of receiving and pursuing TBR complaints that it receives directly. At the same time, it has a role to play in this larger market access picture.

The specific comments we received in relation to the four themes mentioned merit some expansion and elaboration.

*Current Location of the TBR Team*

Especially among EU industry, there was a strong feeling that the TBR team, and by definition the TBR instrument itself, is properly placed inside DG-Trade in its current location as part of WTO Dispute Settlement. While the TBR may not be intended to deal with foreign trade barriers solely in the context of the WTO dimension, the experience of the last 10 years illustrates that in practice the threat or use of the WTO dispute settlement provisions has underpinned almost all action contemplated under the TBR. Hence, there is a natural affinity between WTO Dispute Settlement and the use of the TBR.

There was little appetite for the proposition that the TBR should be located together with the other trade defence instruments operated by DG-Trade, namely the anti-dumping, anti-subsidy and safeguard measures. At first sight, the TBR shares much in common with these instruments in terms of substantive provisions and investigative practices. On the other hand, the TBR is not a trade defence instrument, but rather is “offensive” in nature; it is designed to be an instrument of market access and trade liberalisation rather than protection. This is its defining characteristic. The fact that the TBR is oriented towards problem-solving using the applicable WTO standards also supports its current location side-by-side with the EC Commission’s principal dispute settlement expertise.
We agree that it is difficult to see what tangible benefits, if any, would accrue from relocating the TBR back inside the European Commission’s trade defence instruments directorate as was previously the case at the time of its conception.

The Market Access Unit as the Main Contact Point for Market Access Issues

The view from EU industry and enterprises, and interestingly from EU trade practitioners as well, was that there was a definite need for some form of centralised point of contact inside DG-Trade for EU industry and enterprises to voice their views on measures or actions necessary to alleviate the impact of market access barriers. In this context, it was repeatedly mentioned that foreign obstacles to trade may not necessarily be illegal under international trade rules and, in such cases, the TBR Team was not the right place to air these views. Obstacles to trade may be “unfair”, “protectionist”, “highly damaging to business” or “prohibitive for trade” but still legal if measured by reference to existing international trade rules. Indeed, these kinds of trade barriers are encountered more frequently than outright violations of the international trade rules.

A service inside DG-Trade to help address these kinds of obstacles to trade in the right context was repeatedly stated to be a higher priority than the issue of direct or indirect access to the TBR via the Market Access Unit. In other words, EU industry in particular, views DG-Trade generally as most adding-value when it helps it to look at different options to effectively tackle foreign obstacles to trade.

The view was frequently expressed that the Market Access Unit is best placed to perform this function. In favour of this approach is the possibility that greater efficiencies could be achieved. In other words, EU industry and enterprises would have one centralized (and well publicised) point of reference for market access issues. Once a particular market access grievance is brought to the attention of the MAU, for example, it would be up to that unit to take responsibility and liaise with other elements inside DG-Trade including, if necessary, the TBR team.

The TBR is not, of course, the only way for an EU industry to bring a trade barrier to the Commission’s attention. Formal and informal contacts with Commission officials may lead to action, specifically at the
bilateral level or where a trade barrier does not infringe any existing rules of international trade law. The MAU seems to be in charge of this function at present. For example, according to the Market Access Database brochure, the Commission, if contacted concerning a foreign trade barrier, will:

- Post an explanation of the trade barrier on the MADB;
- Analyse the problem; and
- Determine an appropriate course of action.

Since the MAU already gathers this information and analyses the problem from a commercial and economic perspective, as well as a legal one where appropriate, it seems well placed to assist in the removal of foreign obstacles to trade.

Of all the TBR cases to date, our estimate is that the Market Access Unit was involved, at some stage in the process, in around half of the cases that have been handled by the TBR Unit over the last decade. Equally, it has contacted the TBR team to confirm whether or not action under the TBR is potentially feasible in a number of other instances. Hence, the positioning of the MAU as the central point of contact for reporting and tackling trade barriers should not undermine the functioning of the TBR. On the contrary, it should be complementary.

*Access to Other Parts of DG–Trade for Assistance to Industry*

Some reticence was expressed by a minority of EU trade associations on the precise structure that should be put in place to achieve the positioning of the Market Access Unit as the central point of contact inside DG–Trade. One trade association, for example, suggested that such a centralisation could block their access to other parts of the Commission. Although an EU industry might contact Commission officials having nothing to do with tackling a foreign trade barrier (the example of DG–Enterprise was cited by one) in their view it may be reasonable to assume that the matter in question will eventually be referred to the Market Access Unit of DG Trade.

In our view, these sensitivities could be handled by positioning the Market Access Unit as the principal, but not exclusive, contact point inside DG–Trade for tackling market issues. This would allow private parties to continue to lodge complaints directly with the TBR team, but
could stimulate greater use of the TBR if the Market Access Unit was able to identify which cases were apt to be tackled by using the TBR.

Again in our view, no internal restructuring measures would be necessary to achieve this objective. It is more a question of the presentation of the Market Access Unit to the outside world as the “contact point” for market access issues – in much the same way that this function is performed by the complaints office of the Trade Defence Instruments directorate of DG-Trade. Equally, improved internal co-ordination and indeed “marketing” inside DG-Trade and Commission-wide would also be useful to achieve this result.

Internal Co-ordination and Communication on Market Access and TBR

The vehicle for co-operation inside the Commission between the MAU and the TBR team was principally through the Market Access Action Group (MAAG) which historically involved regular inter-service meetings on issues presented by the Market Access Unit. These inter-service consultations were convened and chaired by the Head of the Market Access Unit and consisted of representatives from other directorates-general, directorates, units and desks within the European Commission, including the TBR and Dispute Settlement team. As and when necessary, the Market Access Unit consulted and co-ordinated with these departments to ensure that a consistent line is taken in tackling each trade barrier.

Inter-service co-operation within the MAAG appears not to have taken place for the last three years. This has obviously had an impact on the co-ordination that can take place on matters that could potentially involve the use of the TBR. Informal, and less regular, lines of communication between the MAU and the TBR team seem to have replaced the regular MAAG meetings.

Since the MAAG was clearly an unsuccessful vehicle for internal communication, rather than resurrecting it, a more constructive proposal seems to be less formal, but more regular, reporting mechanism between the MAU and the TBR team. At the most basic level, a single contact person in the TBR team should be notified when a market access problem brought to the attention of the MAU clearly involves an illegal barrier to trade being maintained by one of the EU’s trading partners. A number of considerations should drive this process:
• Such referrals should not have to await the convening of a formal meeting inside DG-Trade.

• The system should not become log-jammed if the MAU is properly appraised of the standards applied by the TBR Team for assessing barriers to trade as admissible under the TBR.

• A systematic approach must be adopted by the MAU to identify specific cases it decides to refer, or share information on, with the TBR Team.

• Finally, some form of internal accountability procedure must be put in place to make sure that the system put in place is adequately responsive. In other words, a system should be implemented to ensure proper follow-up and reporting to EU industries and enterprises to avoid action against trade barriers falling into an administrative (inter-departmental) limbo.

In this context, the initiatives taken since late 2004 to remodel the MAAG in order to improve the coordination on market access issues within DG-Trade are encouraging.

Obviously, decisions to initiate action under the TBR cannot be taken within any internal Commission reporting system since they require a complaint from an EU industry or enterprise (or in theory a Member State) and follow a prescribed decision-making process. However, there is clearly scope for the TBR team to add its input into this process and, where appropriate, assist the Market Access Unit in performing its functions.

3. Underpinning and Enhancing the Market Access Strategy

Resort to the TBR must remain driven by EU industry and enterprises themselves. It is not inconceivable that action on the part of one of the EU’s trading partners could require a response from the EC Commission to protect EU interests as a whole, but in the majority of situations it is the information received from complaining (or reporting) EU industry or enterprise that forms the basis for action on the part of the Commission. From the point of view of an EU industry facing an unfair obstacle to trade, the wider the range of options available, the more effective the strategy that it is able to pursue. One size does not fit all.
Given the various different options that can be recommended or are available to an EU industry or enterprise faced with a market access problem other alternatives to the TBR may be more expeditious and less formal than the TBR procedure. Indeed, in the “competition” amongst options available under the Market Access Strategy, the TBR process may be the least appealing because of the substantive and evidential requirements imposed under the TBR. It may also be the case that the European Commission itself recognises that, in the particular circumstances of a market access problem being drawn to its attention, a potential TBR complainant has an inadequate or insufficient case for the Commission to prosecute on its behalf. In contrast, “softer” and less formal options may well be more suited.

Responsibility for collecting and gathering input from EU industry to determine which courses of action, if any, may be taken against a particular trade barrier must fall somewhere inside DG-Trade and, in our view, this role should fall to a properly equipped Market Access Unit. Our view is derived from the opinions of a number of EU industries who participated in this project.

There are minor issues that have to be addressed by the European Commission in order to optimise this relationship. For example, at what stage in the process, and to what extent, should the TBR team become involved the analysis of information provided by an EU industry or enterprise to the Market Access Unit? How should information be shared? Should the Market Access Unit carry out a preliminary assessment of the trade barrier from a legal perspective before passing the dossier over to the TBR Unit? Certainly there has to be a move towards closer and more regular contact between the two units.

Hence, there is much to be said for actions to be taken to allow the TBR to underpin and enhance the Market Access Strategy as long as such action does not compromise the present independent operation of the TBR. In this context, our recommendations are:

- The TBR should continue to play its part as one of the instruments available to pursue the removal of obstacles to trade under the Market Access Strategy and steps taken to enhance its role through closer interaction with the Market Access Unit.

- It must be recognised that not all trade barriers encountered by EU industry and/or enterprises are necessarily illegal under the
presently-applicable international rules and, for that reason alone, cannot be remedied through action under the TBR. Some kind of filtering process must be applied within DG-Trade to make this evaluation and, if necessary, determine what other actions are more appropriate. This should, in our view, be the role of the Market Access Unit in implementation of the Market Access Strategy’s objective of removing trade barriers to increase the competitiveness of EU industry and its exports of goods, services, investment and ideas.

- The TBR team should maintain its status as an entity functioning independently from the Market Access Unit and retain its ability to receive TBR complaints directly from EU industry and enterprises. We believe that the current location of the TBR team as part of the Dispute Settlement Unit is appropriate for this purpose and its proper functioning.

- Internal mechanisms and/or processes should be put in place to coordinate action to remove trade barriers maintained by the EU’s trading partners and which undermine the competitiveness of EU industry. This should be achieved through a form of regular internal communication, primarily between the MAU and the TBR Team but also among the directorates, units and desks of the EC Commission that have interests in seeking the removal of foreign trade barriers.
4. Stakeholder Evaluation of the TBR I: Views of Past Users

A major aspect of this project is to examine TBR practice over the last ten years with a view to assessing the results achieved from the perspective of the EU industries and enterprises that have made use of the TBR to tackle the obstacles to trade. What were the expectations of past users when starting TBR actions? Were these expectations met? In those instances where there was a disconnection between expectations and actual experiences, we have tried to identify the main causes for this happening.

This exercise has also allowed us the possibility to draw together some common themes from the experiences of past users particularly as to the ease of access to the TBR complaint procedure, the parts of the TBR that are perceived by users as the most onerous or difficult to meet and other areas where perceived complications arose. Our main objective was to determine whether the TBR, as it presently operates, is considered sufficiently user-friendly for EU industry to use. At the same time, another important objective was to obtain feedback from past users on whether, in their particularly cases, the actions taken under the TBR provided effective solutions to removing or reducing the objectives to trade confronting them.

Before considering these issues, we thought that it was useful to start with a broad overview of the profile of the TBR cases that have been handled to date to place this part of the project in its proper context.

1. The Profile of TBR Cases Since 1995

A: Volume of TBR Cases

Since 1995, there have been 24 TBR complaints pursued by the EC Commission for investigation (23 formal TBR procedures and one case carried forward from the NCPI). The Commission examination reports recommended action in 21 of the TBR investigations. One TBR complaint (US-Prepared Mustard) was terminated on the grounds of a
finding of insufficient adverse trade effects and lack of EU interest in initiating action. Another case (*US–Subsidies to Oilseed Producers*) has been suspended pending further monitoring of the situation.

An impressively wide range of EU industrial sectors have filed TBR complaints: the wines and spirits sector, processed foodstuffs, fisheries, agriculture, leather and textile products, cosmetics, pharmaceuticals, music licensing, steel and industrial manufacturing. These complaints have mainly involved allegations of obstacles in export markets causing adverse trade effects to EU industries and/or enterprises. Four cases have involved consideration of material injury in the EU market but in most of these cases, these claims were combined with allegations of adverse trade effects (*Chile – Transit and Transhipment of Swordfish, Korea – Shipbuilding, Brazil – Proex Financing and US–Subsidies to Oilseed Producers*).

**B: TBR Cases by Country**

No country, with the possible exception of Brazil, has been targeted under the TBR in a manner that does not reflect its importance as a trading partner with the EU. In other words, if patterns and volumes of trade between the EU and the countries in question are examined in detail, there is not a significant mismatch. This confirms, in our view, that the Commission has not used the instrument in a discriminatory or punitive manner against any particular trading partner.

Countries against which TBR complaints have been lodged include Argentina, Brazil, Canada, Chile, Colombia, Japan, South Korea, Thailand, Turkey, Uruguay and the United States.

*Chart 1: Summary of TBR Cases by Country*
The only anomaly is Brazil. This appears to be the result of three separate complaints alleging much the same kinds of restrictions arising as a result of Brazil’s non-automatic import licensing system for a number of different products. If these complaints are combined together, the total number of TBR complaints would be four which would not be exceptional given the size of Brazil’s market.

C: TBR Cases by Kinds of Obstacles to Trade

All of the cases under the TBR have concerned obstacles to trade in goods or the protection of intellectual property rights, as opposed to trade in services. These cases have covered violations of a broad range of WTO agreements, such as the GATT 1994, the Agreement on Import Licensing Procedures, the Agreement on Preshipment Inspection, the Agreement on Customs Valuation, the Agreement on Rules of Origin, the Agreement on Textiles and Clothing, the Anti-Dumping Agreement, the Agreement on Subsidies and Countervailing Measures, the Agreement on Technical Barrier to Trade as well as the Agreement on Sanitary and Phytosanitary Measures.12

Chart 2: Summary of TBR Cases by Type of Obstacle to Trade

Classical Import/Export Restrictions

As a specific type of measure, classical import and/or export restrictions form the largest single grouping of actionable obstacles to trade under the TBR. Some of the obstacles to trade relate to a de jure or de facto prohibition of the export or import of a certain product. In Argentina–Bovine Hides, Argentina inter alia maintained restrictions on the export of raw and semi-tanned hides and skins of bovine animals in
the form of export duties and certain export control procedures amounting to a *de facto* export prohibition.

Similarly, with regard to imports, *Brazil-Retreaded Tyres* concerns a Brazilian outright ban on imports of retreaded tyres. Also, in *Japan-Leather* the Japanese regime for allocating tariff quotas to leather importers made it impossible to export EU leather products to Japan. Furthermore, the fact that the US, in *US-Textiles*, did not recognise certain EU textile products as being of EU origin severely damaged the reputation of the EU textiles industry.

On occasions, the same illegal measure has affected several industries. For example, the Brazilian non-automatic licensing systems and certain Brazilian customs procedures generated complaints regarding products in three different sectors.

**Internal Discriminatory Marketing Measures**

TBR complaints have also concerned a variety of non-tariff barriers in the form of discriminatory or unnecessarily burdensome internal measures applied to products already marketed in the country in question. In *Argentina-Textiles* and *Korea-Cosmetics*, Argentinean and Korean discriminatory and excessively burdensome marketing rules obstructed EU trade. Equally, in both *Colombia-VAT and Motor Vehicles* and *Uruguay-Whisky* internal tax measures discriminated against EU motor vehicles and EU produced whisky, respectively.

**Failure to Protect Intellectual Property Rights**

There have been a number of TBR cases involving intellectual property rights and the WTO Agreement on Trade Related Intellectual Property Rights (TRIPS). Some of these cases have concerned the lack of protection of geographical indications, such as the two *Canada-Geographical Indications Cases* concerning the geographical indications of Bordeaux and Médoc wines and Parma ham and *Brazil-Cognac* concerning the protection of the geographical indication Cognac. Others have dealt with failures to protect various intellectual property rights, such as copyrights (*US-Copyright* and *Thailand-Piracy of Sound Recordings*), data protection (*Turkey-Pharmaceuticals* and *Korea-Pharmaceuticals*) and patents (*Korea-Pharmaceuticals*).
Trade Defence Measures

Surprisingly few TBR cases have concerned trade defence measures. The exception is the US-1916 Anti-Dumping Act Case, where the US amended its illegal Anti-Dumping law, which allowed the sanctioning of dumping by means of fines, imprisonment and damages, only after an Appellate Body Ruling.

We admit to some surprise that this has not been more frequently the case given that there have been so many successful WTO cases against abuse by the EU’s trading partners of these forms of administrated protection. Part of the explanation may be that the European Commission’s trade defence directorate (Trade B.2) monitors the trade defence actions taken by third countries and that the EU may also participate as an interested party in WTO procedures against other countries using trade defence instruments in an illegal manner. Thus the need for a TBR investigation to challenge these kinds of measures may be reduced.

Other Types of Measures

Three cases have dealt with various kinds of subsidies (Korea-Shipbuilding, US-Subsidies to Oilseed and Brazil-Subsidies for Regional aircraft). US subsidies to oilseeds producers were evaluated under the TBR but no formal TBR procedure was initiated on the grounds of lack of evidence. One investigation has dealt with transit rights, namely Chile-Transit and Transhipment, where Chilean transit and transhipment as well as sanitary rules for frozen swordfish impeded the EU’s ability to export this product to the US market.

Services and Public Procurement

No TBR case has, so far, concerned trade in services or the WTO Plurilateral Agreements notwithstanding that, at least one of these agreements (namely the Government Procurement Agreement) is considered extremely important by a number of EU trade associations.
D: General Conclusions

Analysing the general profile of the TBR cases that have been initiated over the last decade confirms that, generally speaking, the EU has been impartial and objective in its use of the TBR. No trading partner has been excessively subjected to its attentions, the range of obstacles to trade targeted under the TBR has been relatively varied and many EU industrial sectors have made use of its provisions.

2. Evaluation of Past TBR Users Experiences

The TBR is a Commercial Policy Instrument whose use is driven by EU industry and enterprises. It is therefore important to assess how EU industry and enterprises view the usefulness of the instrument over this period. For example, does the TBR complaint procedure strike the right balance between ease of access for EU industries and enterprises, on the one hand, and the seriousness of starting international dispute resolution procedures against EU trading partners on the other? Are the TBR’s substantive requirements relatively easy to satisfy, or too complex and burdensome? Generally speaking, are EU industry and enterprises satisfied with the instrument?

In order to seek EU industries views on these issues, questionnaires were sent to past TBR users who we were able to contact and who expressed a willingness to cooperate in this exercise. In summary, questionnaire responses were received from trade associations and enterprises representing slightly more than half the TBR cases that have been initiated – Annex C. These responses represented a reasonable cross-section of industries at EU, national and regional level, as well as in different industrial sectors, from which we felt that reliable conclusions could be drawn. Equally, responses were received from more than thirty different EU and national trade associations which had not yet availed themselves of the TBR procedure but whose responsibilities include trade matters and who were therefore considered possible potential users of the instrument.

Several of the entities in question requested that this information should be treated as confidential. In all cases, these requests have been respected.
A: Analysing the Level of Expectation Created by the TBR

Past users of the TBR report a variety of different reasons for resorting to the TBR in order to improve their market access in the EU’s trading partners. These are, in summary, the following:

- The failure of other actions, notably lobbying, to bring about a successful removal of a trade barrier.

- As a means of bringing a foreign trading partner to the negotiating table and/or raising the profile of the obstacle to trade within the administration of the foreign government as leverage to achieve reform.

- As a means of accessing the WTO dispute-settlement processes for private parties and the leverage that such access brings.

Among past users, there is a general awareness that action under the TBR is a severe course of action which is not to be embarked upon lightly. One past user referred to the use of the TBR as being very much a “nuclear option” and in the majority of other cases, the use of the TBR was described as being a “last resort” for the complaining industry. Certain past users also expressed the view that, in their opinion, it was correct that all available legal and non-legal procedures should be exhausted before a TBR case was initiated because of the perception by foreign governments that resort to the TBR was a confrontational and aggressive act which might, at some future point, have undesirable consequences.

Against this background, it is not surprising that none of the past TBR complainants participating in this study initiated a TBR complaint without having made some other attempt to remove the obstacle to trade, primarily through lobbying in one form or another, or other kinds of contact with officials in the national administration of the country concerned. Indeed, other trade associations that were not past users reported some success with these kinds of approaches. Hence, it seems that, generally speaking, EU industries and enterprises try to make some attempt to exhaust local remedies (both legal and political) before pursuing action under the TBR, even though the exhaustion of local remedies is not required under the TBR – either in the TBR Regulation itself or in practice by the EC Commission TBR team.
In all cases, past TBR users cooperating in this exercise reported that the obstacle to trade being challenged was an industry-wide (EU, national or regional level) problem which caused significant loss of competitiveness in the foreign market and/or substantial financial or monetary damage to the industry in general. For this reason, notwithstanding starting TBR proceedings, the majority of past users surveyed reported that they continued pursuing lobbying actions and other alternatives while the TBR procedure was on-going. This “belt and braces” approach appears to have been motivated, in most cases, more by the urgency of the situation rather than a lack of confidence in the final outcome of the TBR procedure.

Naturally, the pressure that these kinds of background circumstances give rise to also finds expression in the levels of expectations that complaining industries and enterprises have when resort to the TBR is actually made. These expectations are not necessarily that the TBR will lead ultimately to a WTO dispute settlement procedure and condemnation of the trade barrier being maintained by the third country in question. On the contrary, and surprisingly to us, the main expectations about using the TBR raised among past users were the following:

- First, the possibility of an expedited removal or lessening of the adverse impacts caused by the obstacle to trade. This expectation was less pronounced among those past users who had used the TBR in order to counter a long-standing or deeply embedded obstacle to trade that had been created to protect the interests of an identifiable interest group inside the country in question.

- Second, the prospect of some kind of negotiated settlement was preferred by past users – to the extent that such a settlement was both permanent and could not simply be replaced at a later date by different measures, having a new shape and content, but the same impact.

- Third, at a very minimum, resort to the TBR was seen as a means of gaining leverage over a third country. This was regarded as an improvement on previous situations where, in a number of instances, foreign government officials refused to engage in any kind of dialogue with a view to lessening the impact of the obstacle to trade.
Finally, in those cases where TBR users took a long-term view on the actions that would be required to remove the obstacle to trade, a relatively expedient solution was still sought even when it was viewed as inevitable that the case would proceed through the WTO dispute settlement procedures. In these instances, the expectation was that the WTO dispute settlement procedures themselves contained sufficiently embedded time scales to lead to a relatively rapid conclusion of the matter.

In summary, past users of the TBR availed themselves of the process to tackle serious and, in most cases, long-standing trade barriers which they had been unable to remove through other means themselves. The main expectation (or hope) raised was that the TBR would produce results rapidly, primarily through some kind of negotiated settlement to remove the obstacle to trade causing damage.

No doubt expectations are extremely high among past (and potential) users of the TBR for a variety of reasons. In turn, this places a heavy burden of the TBR Team to deliver and, when it is not seen as doing so in line with these high expectations, the TBR procedure as a whole is seen as being deficient.

B: Evaluating Ease of Access to the TBR Complaint Procedure

Action under the TBR, other than by an EU member state, can only be triggered by a complaint made by an EU enterprise (or association of enterprises) on the one hand or an EU industry on the other hand. The importance of a properly formulated and well-documented complaint cannot be underestimated. It forms the basis of the examination procedure which follows, as well as the actions that the Commission will take to pursue the elimination of the obstacle to trade in question. It plays the pivotal role in the whole TBR process.

Notwithstanding the importance of a properly-documented complaint, the TBR itself is relatively short of detail on what precise information and evidence, and critically the standards applied, are required. Both Articles 3(2) and 4(2) of the TBR specify only that the complaint “must contain sufficient evidence of the existence of obstacles to trade and of the adverse trade effects [or injury] resulting therefrom.” Reference is then made to the illustrative list of factors contained in another provision as a means of providing evidence of injury and/or adverse trade effects. A potential complainant is left with the impression that an
adequate complaint may be made based on a short letter together with copies of the offending measures in question. Even DG-Trade’s website giving guidance on how to lodge a TBR complaint gives the impression that this process is relatively straight-forward when in reality it is quite demanding.\textsuperscript{14}

This detachment between the Regulation’s provisions and the standards that must be applied in the context of the EU initiating a formal investigation into the practices of a trading partner has been the direct cause of a lot of misunderstanding among past and potential TBR users. It has raised expectations that the TBR procedure is far simpler than it must be in reality. Equally, it gives the unjustified impression that, once the complaint has been filed, the complaint may sit back and wait for the European Commission to take the initiative towards the ultimate resolution of the market access problem. This is simply not the reality of the process.

\textit{The Practice of the European Commission}

The European Commission, and specifically the TBR Team, has been required to assess, on a case-by-case basis, when a TBR complaint establishes a sufficient \textit{prima facie} case to merit action under the instrument. The TBR itself does not use the term “prima facie” case but this is without doubt the concept applied by the TBR Team when making this assessment. By its nature, and unavoidably, it is a subjective standard. The TBR Team must be convinced by sufficient argumentation and evidence in the complaint to allow them to assess whether or not it is likely that sufficient evidence for an international dispute-settlement procedure can eventually be collected during the investigative phase of the TBR procedure.

Solid evidence is required of the existence of the obstacle to trade being alleged (e.g. copies of the measure giving rise to the obstacle, documented evidence of illegal behaviour, etc). A lesser standard of evidence is required in relation to injury and/or adverse trade effects. Generally, the issue of EU interest is obvious from the start of the case and needs little supporting evidence.

The TBR Team face the possibility of recriminations from the EU’s trading partners, and indeed the complainants, for failing to properly assess the argumentation and evidence in a complaint. The opening of an unjustified investigation into the behaviour of an otherwise friendly
trading partner has obvious implications. It should be borne in mind that the DSU does not permit the use of “best information available” in WTO dispute settlement procedures. Hence, the TBR Team is unable to make the same assumptions as to the facts that are possible in anti-dumping and/or anti-subsidy investigations.

Equally, if a TBR complaint is accepted, and subsequently closed because of lack of evidence, a very unhelpful message is sent out which will eventually have repercussions for the complainant itself. This is unequivocally not in the interests of the complainant.

To anticipate these issues, the TBR Team has taken a number of practical and justifiable steps. Crucially, it encourages potential TBR complainants to submit draft complaints and evidence as well as offering the possibility of meetings to discuss such matters with Commission representatives. At least in the earlier stages of the TBR’s existence, the TBR Team gave active assistance to complainants in the drafting of their complaints.

On the other hand, there have been a number of instances where past users have reported dissatisfaction in the application of these requirements and a perception has arisen among potential users along much the same lines.

*Feedback from Past Users*

Many past TBR users acknowledged considerable pre-initiation advice and assistance provided by the TBR team in the production of complaints. Indeed, in most cases brought to our attention, the past users in question had made contact with the TBR team well in advance of filing, and received comments which they had relied on for a number of key initiation decisions. The TBR team rated very highly in the pre-initiation advice that was provided to all past users, as well as in their explanations of the way that the TBR process would evolve over time in relation to each particular case.

Some past (and potential) TBR users expressed the view that their expectations raised by a reading of the TBR Regulation relating to the preparation of a complaint were not, however, met in practice. For example, these requirements led one important EU trade association that has used the TBR to comment that “there is a large discrepancy between the TBR as a market-opening instrument and the reality faced
by complainants in making a complaint. This leads to a lot of frustration for companies/industries that want solutions to market barriers.”

Another potential TBR user interviewed, while believing it had a sufficiently sound TBR case, was discouraged from proceeding to file because of the volume of additional information requested by the EC Commission during the pre-initiation phase. This experience served to discourage it from using the TBR as an instrument for improving market access for its members despite the fact that its members actively and frequently report such issues to it. Other potential users have also abandoned using the TBR for similar reasons.

Past users have reported that the gathering of evidence to support allegations of certain kinds of obstacles to trade (mainly customs and administrative formalities and practices), injury, adverse trade effects and causation can be difficult. Much turns on the nature of the obstacle to trade which can have widely differing effects which can be hard to quantify. One past user reported being required to submit the same information and evidence on more than one occasion and others seemed confused by the reasons why additional information was being required. These were, however, isolated cases and not by any mean widespread comments.

Proper weight should be given to these comments and they must be placed in the correct context. Other past users reported that, while the requirements imposed for an acceptable complaint were high, this was to be expected in light of the gravity of the process. Indeed, two past users acknowledged that this was completely appropriate. Other past users mentioned that it was not that the standards applied were comprehensively difficult to meet – but only that some of them were, for example the injury and/or adverse trade effects requirements.

It is far from surprising that past users mentioned that the TBR complaint and supporting evidence requirements were the most onerous part of the process for the simple reason that, after the complaint is accepted, the European Commission takes over a lot of the responsibility for actively pursuing the investigation. Equally, from a review of the TBR complaints that we were given access, in our experience, the information and substantive requirements were considerably lower than, for example, in EU anti-dumping complaints.
The essential question is nevertheless whether or not the preliminary standard being applied by the European Commission is too high bearing in mind that many TBR users invoke the procedure not with a view ultimately to the initiation of WTO dispute settlement procedures but in fact with a view to securing a negotiated settlement. Equally, in the course of the examination procedure, many of these factual issues are investigated in great detail.

Assessment of the Standards Applied

On balance, it must be recognised that the judgment of whether a trade barrier maintained by a third country is illegal when measured against the applicable international legal standard is in itself not straightforward. The WTO rules in particular are certainly not user-friendly when viewed from the point of view of the layperson. The overly complex nature of the global regulatory system itself goes a long way towards explaining why the preparation of a TBR complaint requires significant attention and resources.

At the same time, the negative feedback from past users certainly cannot be ignored. A more sophisticated analysis seems to suggest that one particular substantive criterion of the TBR was frequently mentioned as being the most problematic from the point of view of being resource-intensive to fulfil. This was the requirement relating to establishing adverse trade effects (or injury). It was felt by a significant number of past users that this requirement was difficult to satisfy and, in most cases, more supporting evidence was required than was initially thought necessary.

Other requirements in providing supporting evidence, documentation, translations and economic analysis were also referred to as being disincentives to filing complaints: as were the requests for additional information made by the EC Commission’s TBR team during the pre-initiation process. However, in our view, these requirements are crucial to the initiation of a complaint that potentially may start an international dispute settlement procedure and therefore cannot simply be discounted or discarded. There is little support, in our view (and following on from the follow-up interviews of past users) for the argument that these requests were unreasonable. Rather, they are simply part and parcel of putting together a properly substantiated case to the requisite and appropriate standards.
The Question of Resources

Another problem cited was the need to draw on, or have available, considerable resources and expertise, either internally or externally, to put together the necessary components for an admissible complaint. Some of the larger EU trade associations using the TBR were able to draw on internal resources to prepare the complaint – although even in some of these cases, external advisers were used to vet the final versions of the complaint prior to submission. Others simply did not have these resources and had to “buy in” sufficient expertise to help prepare the complaint.

The case of individual companies is quite different. Based on feedback from potential EU enterprise users of the TBR, this group rarely has sufficient resources or expertise available to help prepare a complaint. In the first place, they would look to the relevant EU trade association for assistance in this context. If assistance was not available from this source, it is more likely that individual enterprises would not use the TBR process rather than seek external assistance and expertise to formulate a complaint. This underlines the crucial function that trade associations, particularly at the EU industry level, play in the TBR process. It also highlights one of the main sources of discouragement that EU companies have for pursuing action under the TBR. This point of view was put to us both by large multinational corporations as well as SMEs.

Other Factors Discouraging TBR Complaints

One more important factor regularly cited as discouraging complaints from EU enterprises (and in some cases trade associations) was the fact that the TBR complaint procedure does not contain provisions to protect the identity and confidentiality of the complainant. One EU trade association, whose membership is composed mainly of SMEs, confirmed that “confidentiality is one of the main reasons why companies, particularly SMEs, are hesitant to make more use of the TBR instrument.”

A very real fear of some kind of retaliation at a later stage by the country maintaining the trade barrier is the primary rationale for this sentiment. Hence, it seems likely that the European Commission would be able to encourage greater use of the TBR by EU enterprises if the complaint procedure could somehow be made anonymous.
**Overall Evaluation**

A distinction has to be made between factors within and outside the control of the European Commission and its TBR Team.

In terms of factors within the control of the TBR Team, there seems justification for clarifying the standards applied in making assessments of whether a TBR complaint meets the threshold of being a *prima facie* case. We are fully aware that the TBR Team has recently published a Brochure on how to prepare a TBR complaint. In our view, this may not, however, be enough for potential future TBR users. The formulation of a model complaint, published on DG-Trade’s Internet site may be the start of the process to close the distance between the perceived complaint requirements (as is currently being assumed from the relatively barren terms of Articles 3(2) and 4(2) of the TBR Regulation) and reality. At the other end of this spectrum is the possibility of publishing formal Guidelines on this question. In our view, an accommodation somewhere in the middle of these extremes is to be preferred.

Protection of the identity of the complainant may require either a change in the text of the Regulation or the adoption of a new practice on the part of the Commission. Interestingly, Article 8(1) of the TBR Regulation does not mandate the identification of the complainant in the Notice of Initiation published in the EU’s Official Journal, although this has invariably occurred in the past.

As far as factors outside the control of the European Commission are concerned, it is self-evident that complainants should not be compelled to incur the expenses of external consultants or, worst still, lawyers to prepare a TBR complaint. To save such costs, it seems a relatively simple process to seek guidance from the TBR Team in the form of pre-initiation communications and, where possible, a preliminary meeting. External consultants and/or lawyers only seem necessary, at least to us, in particularly complex situations where the obstacle to trade in question is not unambiguously incompatible with the multilateral or bilateral standards in question.

Finally, as far as translations are concerned, it is not our understanding that the TBR Team requires certified translations of the relevant measures in question to support a complaint. It would seem to us
obvious that any EU industry or enterprise seriously contemplating a TBR complaint would already have had such material prepared, or at least information from their importer, distributor or agent, in order to understand its position vis-à-vis the foreign country maintaining the obstacle to trade in question.

C: Further Analysis of the Complaint Requirements

The existence of an illegal trade practice is not by itself sufficient for a TBR complaint to be actionable. A number of other requirements must be satisfied before a complaint will be deemed admissible and investigated by the Commission. Broadly speaking, the following are the main conditions that must be fulfilled:

- The complainant must meet the requirements for having proper standing to lodge the complaint.

- The trade barrier in question must cause adverse trade effects or injury to the complaining EU industry or enterprise.

- The adverse trade effects or injury must have an actual or potential material impact on the economy of the EU or on a particular region or sector thereof.

- The opening of an investigation, and the adoption of remedial measures, must be in the overall interests of the EU.

Bearing in mind feedback from EU industry, associations and enterprises that, generally speaking, the preparation and lodging of a TBR complaint was not straightforward, we examined each of these requirements in order to determine which were considered most difficult to satisfy.
Requirements for Obtaining Standing

No past user reported that either of the private party tracks for accessing the TBR (Articles 3(1) and 4(1) of the TBR) were excessively burdensome or constituted an obstacle to accessing the TBR procedure. Equally, no potential user co-operating in this Study voiced such an opinion.

As mentioned elsewhere in this Report, the EU enterprise procedure for individual companies and associations of such entities for starting TBR cases aimed at obstacles to trade in export market has been the most frequently relied upon grounds for establishing standing. According to past users, this is for three reasons:

- The overwhelming volumes of obstacles to trade that have been tackled under the TBR relate to trade barriers in export markets which automatically implies recourse to the EU enterprise procedure for establishing standing on the basis of adverse trade effects.

- Most complaints have been filed by existing trade associations (EU, national, regional or sectoral) which automatically qualify for standing under the EU enterprise procedure.

- There is some confusion as to the representivity requirements for EU industries and the need to use this procedure where injury has been sustained on the EU market.

Although it is clear in the text of the TBR that EU industries can use Article 3(1) where the actionable obstacle to trade caused injury inside the EU market, while EU enterprises and associations thereof may use the procedure set out in Article 4(1), the reasons for this distinction were lost on EU enterprises and industries.

We share the view that this distinction is somewhat artificial. Resort to the EU industry procedure for obstacles causing harm in the EU is effectively limited – for example, to potential cases involving third country subsidisation practices which cannot be tackled through the EU’s anti-subsidy instruments. This is demonstrated by the TBR case in US – Subsidisation of Oilseed Production. Other export subsidy programmes were tackled under the EU enterprise route (see, for example, Brazil – Proex Export Financing). Certainly the EU’s anti-
dumping instrument and safeguard action are available to counter the other two major commercial practices which might cause injury on the EU market. The range of actionable trade obstacles covered by Article 3(1) is therefore, in practice, limited.

Notwithstanding the narrowness of the range of practices that can be countered under the EU industry complaint procedure, it should be recalled that only complaints via this route can target alleged actionable obstacles to trade caused by violations of bilateral agreements. In practice, the European Commission has accepted complaints from EU enterprises which potentially include violations of bilateral agreements. For example, in Turkey – Measures Concerning Imports of Pharmaceutical Products, infringements of the EU-Turkey Customs Union Agreement and other bilateral commitments were examined in the context of the examination procedure which concluded that some of these undertakings had been violated.

Due in part to the flexibility shown by the EC Commission in applying Article 4(1) and the limited scope of the procedure created under Article 3(1) for EU industries, the standing requirements for making TBR complaints have therefore been judged by EU industry and past users as being reasonable.

**Proving the Existence of an Actionable Obstacle to Trade**

Establishing the existence of actionable obstacles to trade, according to past users, is relatively straightforward where a published law, decision or regulation is involved. Hence the main problem is when different versions of these measures exist either simultaneously or, alternatively, the measures are changed on a regular basis.

The most difficult obstacles to trade to demonstrate to the satisfaction of the EC Commission are administrative practices and decisions that are not published, or even sometimes not written or, alternatively, are measures based on internal directions operated inside government agencies and/or departments.

Both past users and potential users have expressed the view that this burden would be greatly relieved if other parts of the European Commission’s services, especially representation offices in the countries in question, could be instructed to assist in this information-gathering. In discussions with the TBR Team, it seems to be the case
that these entities are indeed involved in the information-gathering process to some degree. Whether or not this is disclosed to the complainants in question is another matter. Equally, especially in the case of small and medium-sized countries, it is obvious that limited capacity and resources may be available for this purpose.

**Injury/Adverse Trade Effects and Causation**

Almost all past users that co-operated in this project, together with a number of potential users, cited the information requirements for establishing adverse trade effects, injury and causation to be the most burdensome aspects of the TBR complaint procedure.

**Supporting Evidence**

Again almost all past users (and many potential users) offered the view that evidential requirements for a TBR complaint were high. Some past users understood the reasons for which this evidential burden was imposed; others did not. For example, commenting on this aspect of preparing a complaint, one past user observed that “the evidential requirements are the most complex aspects of the TBR, but these are not insurmountable. Indeed, given that the TBR procedure could eventually lead to WTO Dispute Settlement, it seems entirely proper for the complainant to be required to produce enough evidence to enable the Commission to be confident that the facts are as the complainant states them to be.”

At the other end of the spectrum, another past user took the view that “unfortunately the Commission services tend to ask for too much information – both during the process of preparation of a case and after the acceptance – as if all cases were to be treated in the WTO dispute settlement. In the worst case the same information is requested three times at different levels of the procedure. Companies get mad and do not want to cooperate any more as their aim is to be profitable.”

Any attempt to reconcile these opposing perspectives must take into account the original objectives of the complainant at the time of making the TBR complaint. A complainant that has already submitted to the view that WTO dispute proceedings are virtually inevitable to resolve their obstacle to trade is more willing to understand the high evidential burden imposed to substantiate a *prima facie* case. Where the aim of a
complainant is to try to establish leverage for a negotiated settlement, the level of acceptance is clearly lower.

The resolution of this issue goes back to the standards applied by the TBR team in appraising whether a complaint has established a sufficiently robust *prima facie* case.

**D: Post-Initiation Information Requirements**

A number of past users appear to have experienced difficulties in responding to the additional information requests made by the European Commission after the decision has been made to initiate a TBR investigation. One past user offered the view that “during the investigation, the requirements for information imposed by the European Commission grew exponentially.” Others report that this information requirement was as expected.

We believe the explanation for these opposing views consists of two parts. On the one hand, clearly where the European Commission is facing a vigorous defence or resistance from its trading partners in its attempts to tackle a foreign obstacle to trade, it does not have the resources to gather additional evidence itself. Hence, assistance from the complainants will be necessary and will inevitably be more burdensome than in easier cases. Second, it may be the case that the complainants reporting excessive additional information burdens were not advised of this possibility by the Commission at the time they were preparing their complaint.

It is difficult to see what alternative there is to the Commission requesting additional information from the complainants in such circumstances and how this can be alleviated.

**3. Settlement Options and Solutions**

The 24 TBR cases initiated to date can be classified according to the settlement options and solutions that were implemented by the EC Commission. The majority of TBR cases (12) were resolved by the negotiation of some form of bilateral agreement or understanding, some of which are still being monitored to ensure proper implementation by the trading partner in question. A number of these settlements were only reached after the EU requested WTO consultations.
Five TBR investigations ended up in the triggering of formal WTO dispute settlement procedures although, as mentioned above, frequently WTO consultations were requested prior to a negotiated settlement being reached. Three cases are still under review. One case has been terminated on the grounds that no action was required while another has been suspended pending additional monitoring of the situation. This breakdown can be shown diagrammatically as follows:

Chart 3: Summary of TBR Cases by Resolution

The EC Commission has fully demonstrated a clear commitment to pursue negotiated settlements under the TBR procedure rather than reverting straight to the WTO dispute settlement processes. In most of the cases brought to the WTO, the Commission had already unsuccessfully exhausted informal bilateral negotiations with the country in question before deciding to take WTO action. For example, in Brazil-Retreaded Tyres, the Commission services negotiated bilaterally with the Brazilian authorities before finally taking the decision to take the matter to the WTO.

Sometimes negotiations are pursued even before the Commission issues its examination report to the EU Member States. For example, in the Uruguay-Whisky Case, the Commission has made substantial progress in bilateral negotiations under the threat of issuing a negative TBR report. In all these cases, WTO action could be seen as a last resort in cases where bilateral negotiations are not offering an “amicable solution” to the dispute.

In only one case has the Commission recommended WTO procedures without first starting bilateral negotiations. This was the case in US-Textiles, where the Commission decided to take formal WTO action even before the final TBR report was submitted to the EU Member States. In this case, the illegality of the measures at issue was
sufficiently clear to the Commission services at an early stage of the investigation. Moreover, the specific circumstances of the case contributed to that decision, given that the Commission had already negotiated with the US regarding the same topic before the initiation of the TBR procedure, and that the US administration was not able to act without the involvement of the US Congress.

**Negotiated Settlements and Monitoring Actions**

As mentioned above, twelve TBR cases have been resolved through negotiated settlements with the EU’s trading partners. Agreements or bilateral settlements were made in the Argentina-Textile and Clothing, Colombia-VAT and Motor Vehicles, Korea-Cosmetics and Korea-Pharmaceuticals and Uruguay-Whisky cases. In Colombia-VAT and Motor Vehicles, the EU is, however, still awaiting the proper implementation of an agreement already reached between the EU and Colombia concerning the phase out of the Colombian discriminatory VAT regime in question.

In the remaining cases, the TBR procedures have been terminated following a successful and sustainable solution to the matter in question. In Brazil-Stainless Steel, that country’s allegedly WTO inconsistent licensing regime for stainless steel flat products was amended, and the TBR procedure terminated following bilateral consultations. In Brazil-Cognac, the Brazilian authorities registered “Cognac” as a geographical indication in the process of implementing its obligations under the WTO TRIPS agreement. The TBR procedure was subsequently terminated. In Canada-Bordeaux Médoc, the Commission terminated the TBR procedure after the successful conclusion of a bilateral agreement on wine and spirits signed between the EU and Canada in September 2004 that phased out the use by Canada of generic names for Bordeaux and Médoc wine.

Four other cases were settled after WTO consultations were requested and are discussed below.

**WTO Consultations and Dispute Settlement**

The EU has initiated five full-blown WTO dispute settlement procedures as a result of TBR complaints and one recent request for consultations may yet result in such a procedure.
In **US-1916 Anti-Dumping Act** the case was eventually resolved in favour of the EU’s arguments after the Appellate Body issued its final ruling.\(^{37}\) The US has now taken steps to implement this WTO ruling. In **US-Cross-Border Copyright**, again the EU prevailed and the arbitrator’s ruling on compensation has been issued in favour of the EU industry. Again, in **Argentina-Bovine Hides**, the EU once again prevailed and Argentina made some progress in implementing the Panel Report that condemned Argentina’s inconsistent export restrictions for bovine hides. The Commission is still monitoring the application of the new Argentine export regime for the purpose of determining whether the obstacles to trade initially complained about under the TBR procedure still exist. In **Brazil-Subsidies for Regional Aircraft**, the dispute was resolved through WTO dispute settlement between Brazil and Canada.

In **Korea-Shipbuilding**, the WTO Dispute Settlement Body adopted the Panel’s Report, which is a split decision. Since Korea has been granted some time to comply with this Report, it is premature to evaluate the success of the TBR case. In **Brazil-Retreaded Tyres**, the Commission has only recently taken the decision to initiate WTO consultations. In this case, the decision to bring the case to the WTO was taken after unsuccessful bilateral negotiations with the Brazilian authorities.

Four cases were resolved at the consultation stage of WTO proceedings. The alleged WTO inconsistent Brazilian non-automatic licensing procedures and other import measures in **Brazil-Sorbitol** as well as the US rules of origin legislation in **US-Textiles** were eventually amended, and the TBR procedures terminated after WTO consultations. Similarly, in **Brazil-Textile Products**, some progress was made after WTO consultations between the EU and Brazil. The partial solution reached between the parties is still, however, being monitored by the EU. Another case brought to the WTO (**Chile-Transit and Transhipment**) was resolved through an amicable solution before the WTO Panel was formally established.

**No Solutions**

In **Japan-Leather**, neither WTO consultations nor other bilateral negotiations were able to convince the Japanese to change their administrative regime for the allocation of tariff quotas in the leather sector. The TBR procedure has, consequently, not been terminated, pending multilateral negotiations under the auspices of the current
WTO trade negotiating round. In *Canada–Parma Ham*, the EU industry is awaiting further input following a judgement from the Canadian national courts regarding the ownership of the Parma ham trademark in Canada.

In *Turkey–Pharmaceuticals*, the Commission is still negotiating intensely with the trading partner in question. In this case, WTO action is not considered appropriate since the matter could be more comprehensively resolved through negotiations under the EU–Turkey Customs Union Agreement or ultimately in the EU–Turkey accession negotiations. In *US – Subsidisation of Oilseed Production*, the case has been suspended pending the collection of further evidence and in *US – Prepared Mustard*, the TBR case was terminated on a finding of no action (the decision was appealed to the European Court of First Instance and upheld).

Finally, in *Thailand–Piracy of Sound Recordings*, the Commission found that the TBR procedure should be terminated despite the remaining concerns regarding obstacles to trade caused by the lack of enforcement of Thai copyright legislation. Thailand had implemented a large number of policy recommendations on how to tackle piracy and had reduced piracy significantly. Thus, the Commission made the assessment that the termination of the TBR proceedings would send the correct signal of encouragement to the Thai authorities in the ongoing EU–Thai dialogue regarding copyright protection.

### 4. Measuring TBR User Satisfaction

With the assistance of TBR complainants representing more than half the TBR complaints lodged since the TBR came into operation, we investigated the extent to which the solutions derived by their use of the TBR matched their expectations and provided a solution to their problems within the time frame applied.

#### A: Satisfaction with the Outcome of the Procedure

Past users of the TBR provided a wide range of responses and comments to the question of whether the procedure rendered a satisfactory outcome for them in terms of the removal of the obstacles to trade cited in their complaints.
One past user reported that its two TBR cases “did not provide an adequate solution to all problems but did provide a permanent solution to some of them.” Generally, however, this user confirmed that overall market access conditions in the country concerned had noticeably improved as a direct result of the TBR. Another past user confirmed that the settlement reached by the European Commission was “very satisfactory” in terms of reducing the obstacles to trade faced by its exporters. One past user, responsible for the filing of several TBR complaints, felt that market access for its members had only marginally improved in the countries cited in the complaints.

Other past users expressed complete dissatisfaction at the solution reached in their TBR proceedings for very different reasons. One past user, who invoked the TBR procedure in attempts to resolve very long-standing import and export restrictions maintained by separate countries, confirmed that the TBR procedure did not help find a solution to the problems of its members. This was despite the fact that one of the complaints ultimately led to WTO dispute settlement procedures in which the EU prevailed. It commented that “the fact that no action followed in spite of winning our cases was actually very counter-productive. It provided a signal to other countries, telling them that there is absolutely no need to lift trade obstacles identified by the EU because the EU does not follow up in insisting on the application of the redress action. As a consequence, other countries implemented similar trade restrictions.”

In a similar vein, three other past users reported no significant market improvement in market access stemming from the lodging of their TBR complaints. In two of these cases, again these TBR complaints resulted in formal WTO dispute settlement proceedings in which the EU secured either an outright or partial result in its favour. Yet, in one instance, the user in question commented that, despite prevailing in the WTO proceeding, far from producing a tangible benefit, the result “seriously undermined the economic value of European intellectual property rights in America.”

While the views of past users on the suitability and nature of the outcome of their TBR case vary from one extreme to the other, three common themes can be detected.

First, the fact that a TBR complaint evolves into a formal WTO dispute settlement procedure, and even ultimately a successful ruling for the
EU, is not in itself a successful outcome from the perspective of a complainant. The WTO DSU contains significant possibilities and options allowing WTO members to procrastinate and even avoid proper implementation of panel and Appellate Body rulings. This is simply a fact of life in WTO litigation and there are many instances, both involving TBR cases and not, where WTO members have failed to implement their obligations when found to be in breach. This aspect of the TBR is essentially tied to the inefficiencies of the WTO dispute settlement system itself and is not actually a reflection of a weakness in the fabric of the TBR or its procedures.

Second, the degree of satisfaction or otherwise reported by TBR complainants varied in relation to the nature of the obstacle to trade tackled. Where obstacles to trade were long-standing, deeply embedded and reflected measures to protect identifiable interest groups inside particular countries, negotiated settlements were protracted and the final settlements reached were subject to criticism for their lack of permanence and enforceability. Obviously the converse was equally true to the extent that relatively clear-cut infringements could be tackled effectively.

Third – and crucially – a lack of symmetry appears to have emerged between the expectations of users at the time the TBR complaints were lodged and the ultimate results in each case. Most past TBR users reported that market access had improved as a result of using the TBR. On the other hand, these improvements failed to meet the expectations that were originally entertained which, in turn, led a number of past users to express dissatisfaction with the final outcome.

Overall, it is difficult to reach a single conclusion on the extent of user satisfaction with the TBR over the last ten years. Views on the satisfaction of past users on the final outcome of each investigation are highly polarised. In our view, the main way to explain these opposing views is by reference to the initial expectations raised by resorting to the TBR procedure.

**B: Time Lines**

A lot of past users reported dissatisfaction with the time frame within which their complaints were pursued. Different causes were blamed for the effective delays that were expressed as having occurred.
Generally speaking, most past users did not directly attribute responsibility for apparently delays on European Commission officials. In most instances, past users felt that delays were caused by factors out of the hands of Commission officials. Minor criticisms were levelled at the Commission’s handling of cases in two respects. First, in a minority of cases, past users felt that the Commission requested additional information, after publication of the Notice of Initiation, which had already been provided. Second, in some instances, past users did not agree that the Commission officials had pressed the other side forcefully enough in order to achieve a satisfactory and sufficiently prompt negotiated settlement.

Clearly, as an investigation evolves over time, additional information has to be provided to respond to the claims made by the trading partner maintaining the alleged obstacle to trade. No investigation is a static exercise in which counter-claims do not have to be addressed. In this respect, it seems to us that the Commission is simply performing its responsibilities properly in discharging its investigative role under the TBR.

It seems that certain past users were under the impression that it should have been the function of the Commission services or, in some cases, the Commission’s representation offices in the foreign country, to gather evidence and information to support their case. Instead of being investigators, in their minds, the Commission should have been prosecutors. This perception of the role of the Commission’s services is at odds with the responsibilities conferred under the TBR for carrying out an objective, impartial and proper investigation of the facts surrounding any TBR complaint.

Equally, the European Commission and the TBR Team must be very mindful of overselling the TBR as an imminent solution to the problems of a complainant. Generally speaking, it would seem more prudent to err on the side of caution rather than to encourage a potential TBR complainant that a solution to their market access problems will materialise simply by the lodging of a TBR complaint.

Delay caused by the triggering of WTO dispute settlement procedures is also an inevitable part of the functioning of the instrument itself. Neither the Commission nor the TBR (as an instrument) should bear blame when delays are caused by the proper discharge of the WTO dispute settlement process and the exhaustion of the numerous forms
of appeal and arbitral review that can be requested by the other side. Frustration on the part of TBR users can only be eased to some extent by proper explanations of the possible length of time that it may take to complete a WTO dispute settlement procedure to a potential user at the very start of the procedure.

As to the criticism levelled that the Commission may not have pressed sufficiently hard for an effective and prompt negotiated settlement in some instances, this can only be judged on a case-by-case basis. Whether or not a trading partner is genuinely attempting to remove an obstacle to trade in good faith is a difficult question of judgment to make. Clearly some trading partners have entered into settlement negotiations in the past with little real commitment to take remedial action. These negotiations have simply served to forestall having to take an action. The delays that have been reported might have been curtailed, if a time deadline was prescribed in the TBR for the negotiation of a settlement; and if the failure to negotiate a settlement within that specific timeframe justified the automatic triggering of formal dispute settlement procedures.

**C: Participation in the Negotiated Settlement Processes**

All past TBR users stressed the importance of attempts to achieve a negotiated settlement as a means of removing an obstacle to trade rather than having to exhaust formal WTO dispute-settlement processes. In a large number of TBR cases, negotiated settlements have been reached with a view to removing the trade barrier in question. However, clearly a number of past users were not satisfied with the settlements that were reached in specific cases.

The main reason for this perspective appears to be that the complainants feel that they have little input into the formulation of any mutually agreed solution. This is because the Commission has exclusive competence under the TBR to determine the period of negotiations, the agenda for such discussions and, of course, whether a particular kind of agreement has the effect of removing or reducing the obstacle to trade under investigation.

Past users report that they were informed at regular intervals on the progress of their case towards a negotiated settlement but ultimately they had little influence over the content of any final settlement measure. Concerns regarding the enforceability, permanence and
appropriateness of negotiated solutions had, on occasion, not been given sufficient weight which in turn leads to a less than perfect arrangement between the EU and its trading partner to remove an obstacle to trade.

In addition, a number of past users questioned whether monitoring operations put in place are effective. Some past users felt that monitoring operations were simply a way of allowing the Commission to put on hold the need to adopt a more forceful approach to removing a trade barrier. This point of view certainly seems to us to have some weight. The suspension of TBR proceedings for further monitoring does not encourage trading partners to remove a trade barrier and simply seems to place specific TBR investigations into a state of legal limbo. This is unsatisfactory from the point of view of both legal certainty and user satisfaction.

The question that subsequently arises is whether a TBR complainant should be more actively involved in the negotiation of a settlement designed to remove a trade barrier. Should the consent of the complainant be required before the European Commission is able to enter into a settlement agreement? In our view, this is probably going too far. On the other hand, past users have demonstrably felt alienated during this process. The ultimate result is a level of dissatisfaction among some past users that might not have been so high had they been involved somehow in settlement discussions.

**D: Responsiveness of the TBR Team**

Generally speaking, the TBR team rated highly in terms of responsiveness to enquiries made by TBR complainants. This was especially so during the pre-complaint phase where the TBR team is generally willing to meet to discuss possible complaints, strategic options and evidential requirements.
5. Stakeholder Evaluation of the TBR II: Views of EU Industry and Potential Users

Objectively speaking, the volume of complaints made under the TBR has not been enormous. In contrast, the EU has started WTO consultations procedures in around sixty instances under the alternative procedure available to EU industry and Member States, namely the 133 Committee procedure. This is, of course, ignoring for the moment the significant number of cases that other units and country desks of DG-Trade have handled on behalf of EU industries and enterprises faced with market access problems.

These statistics raise the question of why EU industries and enterprises do not make more frequent use of the TBR and the procedures made available under this instrument? Hence, we asked a number of EU and national trade associations, as potential users, to provide us with their views on the TBR, its attractiveness to them as an instrument for removing illegal trade barriers and their knowledge of the instrument. The same exercise was carried out at the level of EU enterprises. This section of the Report deals with their responses.

1. The Views of EU Industry on the TBR

The views of EU industry on the TBR, and especially those of potential users, were sought and expressed mainly via EU and national trade associations as well as individual enterprises. The views of trade associations were particularly useful for a number of reasons. First, the TBR itself permits EU trade associations to lodge complaints with the European Commission on behalf of their members and they are, to a large extent, the audience to which the instrument is addressed. Second, it has become evident through the field work carried out for this project that individual companies and enterprises often expect their EU and national trade associations to provide guidance on actions to tackle barriers to trade in third countries. Indeed in some cases, trade associations have expertise permanently engaged for the purpose of giving this kind of advice. Third, commonly EU trade associations are the interface between the EU industry and the Commission’s services.
For this aspect of the exercise, questionnaires were prepared expressly for the purpose of soliciting the views of EU industry in the form of trade associations (both at EU level and national level). We have endeavoured to ensure that these associations are representative of all industrial EU sectors (including services). In order to obtain a true North-South-East-West perspective on this issue, we also concentrated efforts to obtain co-operation from national trade associations and enterprises in the 10 new EU member countries including Poland, Estonia, the Czech Republic and Hungary. The table in Annex D summarise the extent of cooperation received.

A: General View of EU Trade Associations

The prevailing view among the EU industry in general, as expressed by both trade associations and individual enterprises, is that an instrument such as the TBR is extremely desirable but that substantial reforms are required to make it more user-friendly and attractive. It is perceived as being an important and powerful weapon in the EU’s commercial instruments arsenal but its availability is neither well-known nor perceived as easily accessible.

In the view of a number of key EU trade associations, it is important that the TBR is not over-sold as a panacea for all market access problems. Expectations raised by the European Commission in promoting the use of the TBR must be actually met and, equally as important, seen to be met among EU industries and enterprises. Rightly or wrongly, the TBR has broadly been seen as failing to meet these expectations for a number of reasons explained in the next section.

As far as the future shape of the TBR is suggested by EU industry, there are two polar extreme positions. On the one hand, some parts of EU industry put forward the view that the requirements of making and pursuing TBR complaints should be relaxed to the extent that exercising this option should be less burdensome on the complainants. Certain targeted revisions can be made to achieve this goal. At the other extreme, some EU industries believe that it should be the European Commission that takes on the full burden of pursuing a TBR case, including information and evidence gathering as well as investigation, at the request of specific EU industries. Obviously, satisfying this point of view would require a wholesale restructuring of the TBR as it stands at present as well as parts of DG–Trade itself.
B: Views on Specific Aspects of the TBR

Summing up the consensus among EU industry rather nicely, one major EU trade association expressed the view that “notwithstanding a large number of potential cases, in practice only a few cases have been brought forward by EU companies/industries. This is not due to a lack of company knowledge of the existence of the TBR but due to the complexity of using the instrument. For instance, most national business federations find it simpler to contact their national governments regarding trade obstacles that companies face rather than go through the more complicated and costly TBR procedure.”

Similar pronouncements were made by other equally significant trade associations. One trade association which represents EU enterprises throughout the EU-25, and which is a very active user of the other EU commercial defence instruments, reports that having been unsuccessful in its attempts to launch a TBR case in the past, it is now “reluctant to use the TBR in light of the unclear requirements to successfully launch a TBR investigation, the opaque procedure and the uncertain outcome often influenced by political considerations.” The same association also called to substantial improvements in the application of the TBR to make it a useful market access instrument for industry.

These comments, which typify many we received in the course of this exercise from trade associations familiar with the TBR, identify five features of the TBR that discourage widespread and more frequent use of the TBR by EU industry, namely: (a) the perceived complexities of the TBR; (b) the ease of pursuing alternative, and some might say, competing processes either directly with the EC Commission or via Member States; (c) the time frame within which settlements are reached and the quality of the outcome; (d) the perception that political influence plays a part in the TBR procedure; and (e) cost. The views of trade associations who said that they were unaware of the existence of the TBR, yet still had views on the problematic features of the instrument, were discarded in this analysis.

The Perceived Complexities of the TBR

According to opinions heard, there is a large discrepancy between the ambition that the EU has with the TBR, as a market-opening instrument, and the reality faced by complainants. This apparently
leads to frustration for companies/industries that want immediate solutions to market barriers. Specifically, the information and evidential burdens are repeatedly reported as being a major factor in discouraging greater use of the instrument.

Other associations suggested that more resources should be dedicated at EU level to the support of industry in the preparation of a submission. Requirements in respect of the admissibility of the submission should be more balanced and reasonable. They thought that it should not be expected from industry to provide evidence and detailed information on infringements operated by governments, all the more so when the EU itself is unable to obtain the necessary clarifications.

The general conclusion is that any efforts to make the TBR procedures more simple and easy to use, and to increase companies' awareness of the TBR, would be welcomed. Since few of the associations participating in this part of the exercise were in fact actually past users, these views reflect a relatively objective, albeit inexperienced, perspective on the instrument.

At this point in the Study, an apparent contradiction arose. On the one hand, past users assert that the complaint requirements, as stated on the face of the TBR Regulation, give the appearance that preparing a complaint is much easier than in reality. Yet, potential users who are familiar with the instrument report that the information and evidential burdens appear too high without having had the actual experience of trying to use the TBR. The only way that these two opposing views can be reconciled is by reaching the conclusion that past users have shared their experiences with a number of potential users that participated in this project and, overall, the impression was left that the TBR procedure was too difficult to pursue.

The Comparative Ease of Other Solutions

All things being equal, EU industries and enterprises, and the trade associations which represent these entities at EU and national level, seek to pursue the quickest and cheapest remedies to improve their market access opportunities in third countries. Lobbying is often cited as a highly effective and relatively cost-efficient way of pursuing these aims. Correctly or not, the TBR is not seen as having neither of these advantages. Hence, parties interested in improving market access tend
to rely more heavily on lobbying rather than possibility triggering international dispute settlement procedures.

The TBR is, to a certain extent, in competition with these other ways of influencing the market access decision-making processes. This is discussed in detail in the section below.

**Time Frame for Settlements and the Quality of the Outcome**

Typifying this concern, one trade association observed that “from our – and our members’ – point of view, when faced with a trade barrier, the priority has to be securing its removal as quickly as possible. The emphasis in the TBR procedure on negotiating with the third country government from an early stage is, therefore, most welcome.”

**The Perception of Political Influence**

Some elements of EU industry offered the view that, in theory, it is possible for a company/industry to lodge a TBR case, but in reality, the choice of how to deal with the barrier appears to be driven by political considerations depending on the country, the type of barrier or the timing (e.g. links to trade negotiations at multilateral or bilateral level).

Throughout the course of the research carried out for this Study, we have not come across any evidence to support this claim. On the contrary, as far as we are able to tell, the TBR is engineered to limit political influence, promote transparency and give EU industry and enterprises a greater array of options to pursue. It may be that other units inside DG-Trade, including possibility the Market Access Unit, try to assist EU industry in reviewing market access options, some of which might include the possibilities mentioned above.

The TBR has been used against large, medium and small trading partners, across a range of different kinds of sectors, and in hotly contested areas of international trade regulation (for example TRIPs). This also strongly counters the suggestion that political considerations play a significant role in its operation.

**The Cost Element**

Most trade associations and enterprises that were aware of the existence of the TBR were under the impression that a complaint under
the TBR procedure requires significant expense for the complainants in terms of legal advice, economic analysis, and similar research.

It was also commonly stated that requirements in respect of the acceptability of the submission should be more balanced and reasonable. In their view, companies/industries should not be expected to provide extensive evidence and very detailed information regarding trade agreement infringements by foreign governments. The EU institutions, it was claimed, have a bigger role to play in obtaining the necessary information/clarification.

These opinions go very much to the heart of the discussions of the TBR as an instrument placed in the hands of EU industry for their own use. It seems that, unless the European Commission is willing to pick up a larger share of the responsibilities (and costs) of pursuing action through the TBR, EU industry is quite reluctant to make the investment necessary – in time and money – to use it. This may also partially help explain why the number of TBR cases over the last ten years has remained at comparatively low levels.

**C: Concerns over Confidentiality**

For individual companies, concern over confidentiality is one of the key factors why they are reluctant to use the TBR. The need to ensure protection for complainants from retaliatory or penal actions on the part of the country maintaining the trade barrier was a paramount concern. Clearly this issue needs to be addressed.

**2. Alternatives to the TBR Used by EU Industry**

There is little doubt that the TBR competes with a number of other options that can be used by EU industry against obstacles to trade maintained by third countries. Specifically, EU trade associations aware of the TBR (and some of their advisers) referred to two other possible options, namely: (a) assistance from other units of DG–Trade (notably the Market Access Unit and the country desks) to pressurise trading partners into removing barriers to trade; and (b) the initiation of WTO dispute settlement procedures through the 133 procedure.

The existence of these alternative solutions is clearly one explanation why the TBR has not been more frequently used by EU industry and
enterprises. For this reason, it seems appropriate to explore this apparent competition of remedies in more detail.

**A: Assistance from Other Units of DG-Trade**

A theme that we have repeatedly heard is that the TBR does not seem to offer the possibility of a sufficiently certain resolution within a sufficiently short time frame. This in turn has meant that EU industries and enterprises have found alternative courses of action (including the ones cited in the Market Access Strategy) as more appealing. One association reported that “recourse to TBR is not always actively promoted by the Commission services themselves. When tackling a trade barrier with DG Trade, it is rarely suggested to launch a TBR case. The bilateral route is generally the preferred option.”

Another national trade association found it “difficult to see the value added that the TBR procedure is supposed to create. TBR is time and resource consuming and its outcomes are not encouraging.” That association preferred to forward information on market access problems to the national governments and the Commission in a less formalised way. To this organisation, it was of utmost important that the civil servants in charge take the market access problems business has to face seriously and that bilateral diplomatic contacts are used to address the problems.

There is, of course, nothing that should be done to discourage EU industries and enterprises from actively pursuing alternative solutions to their market access problems. Indeed, where a barrier to trade is unfair, discriminatory or unreasonable – rather than illegal – this may be the only course of action. The point worth stressing is that EU industries and enterprises may pursue these alternative options when more effective action may in fact be available under the TBR.

Ultimately, this is an issue that goes back to the question of greater internal co-ordination and centralisation for dealing with market access issues inside DG–Trade. The resolution of this situation should automatically mean that EU industries and enterprises are adequately informed of the range of options available to them to tackle a foreign obstacle to trade. The TBR should not be seen as losing out in this competition but rather as being part of the same team.
B: The 133 Procedure

Traditionally, the main avenue for an EU industry to trigger action at the WTO level is through the 133 Committee. Through this procedure, the European Commission, in consultation with the Member States through the 133 Committee, can initiate proceedings in the WTO Dispute Settlement Body (DSU). There is, consequently, an overlap between the TBR and the 133 procedure to the extent that starting WTO consultation procedures opens up the possibility of exploring settlements with foreign trade partners or, alternatively, initiating formal dispute settlement procedures.

The major difference is that the TBR contains certain rights which are made available to EU industries and enterprises while the 133 procedure is more political in nature. This can have some advantages but it also means that factors other than the interests of the EU industries and enterprises are taken into account when a decision is taken whether or not to invoke the 133 procedure and to initiate international action.

Measured in terms of volume alone, which admittedly is a very imprecise manner for making such a comparison, only ten out of sixty-three requests for consultations made to the WTO Dispute Settlement Body originated from the TBR, which represents approximately 16% of all such cases initiated by the EU against its trading partners.

Our discussions with EU industry suggest that there are a number of factors that have contributed to this imbalance. The protection of the confidentiality of the industry and/or enterprise behind the action is one major factor cited. There is also a perception (justified or otherwise) among EU Industry that the 133 procedure appears to by-pass the evidential burdens placed on TBR complainants. Again the perception of the direct participation of Commission officials and experts on the side of the EU industry, as opposed to their position in TBR proceedings, was mentioned as a favourable factor. Finally mention should be made of the opinion that the 133 procedure ostensibly appears to have more flexibility in comparison to the TBR.

Some of these perceptions do not withstand close scrutiny, especially those where the feedback originates from industries and/or trade associations that have little, or any, first hand experience with either the TBR or the 133 procedure. For instance, it seems highly unlikely...
that the European Union would initiate a formal WTO dispute settlement process under the 133 procedure without having any evidence gathered beforehand to support the case. Such an approach would be a recipe for failure before the WTO dispute settlement body.

Equally, it seems also obvious that the 133 procedure is probably more open to political currents that may be undesirable, from the perspective of industry, in contrast to the relative legal certainty and accountability that the TBR Regulation offers.

On the other hand, statistically, the fact cannot be ignored that the TBR is losing business to the 133 Committee procedure as far as EU industries seeking direct and immediate access to the WTO dispute settlement procedures are concerned. The only way to redress this situation is for steps at the political level to be taken to channel possible market access opening actions away from the 133 procedure and towards the TBR. This in turn raises the question of why this should be done if the present situation is apparently acceptable to EU industry as has been stated in this section of the Report?

3. Level of Awareness of the TBR

Another explanation for the comparatively low number of TBR cases initiated annually over the last ten years could be a general lack of awareness of the existence of the instrument itself and not only the perceived difficulties in its operation. To investigate this issue further, EU and national trade associations were asked for their views on their level of awareness of the TBR. A similar exercise was carried out for members of certain national trade associations who were willing to seek their members’ views on this issue.

A: EU Trade Associations

The following table reflects the results that were gathered from twenty EU trade associations participating in this Study who were asked about their level of knowledge of the existence of the TBR and its functions.
Among these EU associations expressing detailed knowledge of the TBR, three were past users of the instrument. Together with two other associations, this represents the totality of the EU trade associations possessing a detailed knowledge of the instrument. Slightly more than this number expressed the view of having some general knowledge of the TBR. More than half of the EU trade associations participating in this exercise had no knowledge of the TBR or its functions.

We would emphasis that almost all the EU trade associations participating in this exercise stated that they were actively engaged in providing advice and assistance to their members on international trade matters. A number of these associations had even sent representatives to participate in the European Commission’s Market Access Symposium two years ago which partly involved break-out sessions on the TBR.

Even among EU trade associations that used other EU trade remedy laws (for example, the EU’s anti-dumping laws and the anti-subsidy provisions) or were heavily involved in trade matters (WTO/DDA issues, the FSC dispute, quotas, etc) the level of awareness of the TBR’s substantive procedures and potential was remarkably low. One trade association which regularly files anti-dumping complaints reported that “it was not familiar with the practicalities of applying the TBR” although the association had experts in trade law and policy.

B: National Trade Associations

The following table reflects the results that were gathered from fifteen national trade associations participating in this Study who were also asked about their level of knowledge of the existence of the TBR and its functions.
Again one national trade association participating in this exercise had successfully filed a TBR case and therefore had detailed knowledge of the instrument. It was joined by one more trade association in Germany that also understood the workings of the TBR. Three national trade associations had heard of the TBR. Ten national trade associations had no knowledge of the existence of the TBR.

**C: EU Enterprises**

The following table reflects the results that were gathered from nineteen EU companies participating in this Study who were also asked about their level of knowledge of the existence of the TBR and its functions. These companies ranged in size from multilateral corporations based in the EU to a number of SMEs.

One of these companies was an active participant in a TBR compliant lodged by an EU trade association. No other company participating in this exercise reported having detailed knowledge of the TBR. Two companies have a general awareness of the TBR. The remaining 16 companies had no knowledge of the existence of the instrument.
D: Analysis of Results

We have derived three conclusions from this exercise.

First, trade associations operating at the EU level play an important role in advising their members of the availability and functioning of the EU’s commercial trade policy instruments. Yet, even among these operators, the level of awareness of the potential of the TBR remains extremely low. Few of these associations are able to provide their members with detailed knowledge of the instrument. An even smaller number are in a position to recommend to their members that activation of the TBR may provide a solution to market access issues and trade barriers that injure their commercial activities.

Second, as one moves from the EU level to the national level, as far as trade associations are concerned, the level of awareness of the existence and possibilities under the TBR declines dramatically. Consequently, at national trade association level knowledge of the TBR and its potential use becomes far more limited.

Third, the level of awareness among individual EU enterprises of the TBR is very low. This would go some way to help explain why relatively few TBR cases have been filed by EU enterprises. Simply put, even those EU enterprises that have sufficient resources to activate a TBR complaint do not have a sufficient level of knowledge of the existence of the instrument and even less awareness of how to proceed to prepare and file a TBR complaint.

Clearly this situation has to be addressed by the European Commission if the level of awareness of the TBR should start to approach that of other EU trade policy instruments among EU industries and enterprises.
6. Analysis of the Key Concepts of the TBR

The Trade Barrier Regulation was conceived in a time where international trade regulation was taking a dramatic new shape. The World Trade Organisation (WTO) was coming into being which in itself represented a dramatic transformation from the pre-existing global regulatory system. Eight years of multilateral trade negotiations were poised to reap fruit. It was clear to all concerned that a new phase in global trade regulation was about to begin and this new structure had two prevailing characteristics.

First, the new World Trade Organisation embodied a clear shift away from the “soft law” or diplomatic approach that underpinned its predecessor, the General Agreement on Tariffs and Trade (GATT). The new organisation would be more focused on a legalistic approach albeit with some quirky aspects retained from its earlier heritage. The WTO Dispute Settlement Understanding (DSU) was widely hailed as a great success in achieving this transformation and the creation of the Appellate Body established the priority of the rule or law in the nascent organisation. This represented both an institutional and organizational consolidation when compared to the previous point of reference, namely the GATT.

Second, the scope of the areas subject to effective regulation at the international trade level simply ballooned. Protection of intellectual property rights was brought within the scope of trade regulation for the first time. Cross-border services and other ways or modes of providing services in third countries were regulated for the first time and trade-related investment was protected. More effective disciplines were established across a whole swath of the traditional areas of regulation such as, for example, subsidies, anti-dumping, discriminatory technical barriers to trade, etc.

Against this background, the EU decided to take action to bridge the gap between private party rights and the WTO dispute settlement processes by adopting a formal EU instrument that allowed the EU institutions, and notably the EC Commission, to act as the interface between private parties (EU industries and enterprises) and dispute
settlement processes against the EU’s trading partners that were not living up to their commitments under the WTO Agreement.

There were also, for course, other routes for EU industries to initiate WTO dispute settlement procedures via the EU, notably through the Article 133 process. However, the prevailing consensus at the time among EU decision-makers was for a special instrument, formalizing this procedure, conferring rights on private parties (and indeed protections for the EU institutions) and demonstrating a more profound commitment to transparency and greater accountability.

Equally, the EU already had a similar kind of trade instrument in the form of the New Commercial Policy Instrument (NCPI). The question is why did the EU not simply amend this instrument to match the changing needs of the time? There are many possible explanations. However, it is relatively clear that the NCPI was not perceived as having been a successful experiment in EU trade law and policy. Only a handful of cases were initiated since the instrument came into force. European industry found the NCPI over-complicated to use and relatively ineffective.

So, with a fresh sheet of paper on the drawing board, the European Union started again to design a trade instrument that could act as the interface between EU industry and enterprise, on the one hand, and the WTO dispute settlement mechanism on the other.

Other strands and themes were drawn into the picture. If the EU was to create such a trade instrument, it should encompass all the new areas and disciplines created by the World Trade Organisation – goods, services, protection of intellectual property rights and all the rest. What about the EU’s extensive network of bilateral trade and partnership agreements – should these be brought under the scope of the new instrument?

While there was a high degree of comfort in giving private parties in the EU significant empowerment in the form of legal and procedural rights, it was also correctly predicted that the TBR must have some form of safety value to prevent the EU running on autopilot into an international dispute which might have negative consequences as a whole for the EU. Some form of EU interest test was therefore seen as desirable to release these pressures.
Taking all these themes together, the silhouette of the TBR became clearly etched against the backdrop of EU trade policy. The nuts and bolts still had to be added to give the instrument its proper form. Here, a decision appears to have been made to borrow some of the key concepts employed in the EU’s Basic Anti-Dumping and Anti-Subsidy Regulations. Doing so appears to have had both a positive and negative influence on the final shape of the TBR. On the positive side, at least some of these concepts were tried and tested with some degree of success under other trade defence instruments. On the other hand, some of these concepts do not seem to sit comfortably inside the TBR itself.

Against this background, this Section of the Report analyses the key substantive concepts upon which the TBR has been framed. This aspect of the analysis has been carried out mainly from a technical point of view rather than from a commercial one. The main issues that we are seeking to address are how the key substantive concepts of the TBR fit together, especially as far as the preparation of complaints is concerned, whether any of the key concepts are unnecessarily cumbersome and what actions, if any, are needed to streamline the application of these concepts.

1. Actionable Obstacles to Trade

The concept of an actionable obstacle to trade is, of course, at the very heart of the TBR. It defines the kinds of foreign trade practices which can be challenged under the instrument itself. The TBR defines an actionable obstacle to trade in the following terms:

“Obstacles to trade shall be any trade practice adopted or maintained by a third country in respect of which international trade rules establishes a right of action. Such a right of action exists when international trade rules either prohibit a practice outright, or give another party affected by the practice a right to seek elimination of the effect of the practice in question.”

Although the definition of an actionable obstacle to trade is established by reference to a right of action on the part of the EU under international trade rules, in simplified terms, actionable obstacles to trade are measures and practices adopted or maintained by third countries which contravene the terms of the WTO Agreement and its
annexes as well as the provisions of other agreements to which the EU is a party and which set out rules applicable to trade relations. This latter category mainly consists of bilateral agreements between the EU and third countries.

A: General Approach Taken by the EC Commission

Generally speaking, in practice the European Commission has had cause to interpret the concept of “obstacles to trade” only in the context of the multilateral trading rules established under the WTO system. Violations for WTO obligations have invariably formed the main platform for acceptable TBR complaints. On occasion, bilateral agreements have been relied upon in a supplementary capacity (for example the EU–Turkey Association Agreement, the EC–Brazil Framework Agreement and the EU–Mercosur Framework Agreement). No bilateral trade agreement has ever formed the exclusive ground for a TBR complaint.

Most TBR cases have been initiated on the “traditional grounds” established under the WTO/GATT system, namely import and export restrictions, MFN, national treatment, technical barriers to trade and illegal subsidies. A healthy proportion of cases have been started under the TRIPs Agreement. Occasionally, there has been a TBR case based on one of the more obscure provisions of the GATT 1994, for example the right of transit cited in the Chilean Swordfish Case. On the other hand, neither the GATS nor the TRIMs Agreement have played a central role in any case so far.

The European Commission is, of course, not in a position to determine what legal basis should be relied on by an actual or potential TBR complainant. Indeed, the Commission reports simply never having received any admissible complaints based exclusively on the substance of bilateral agreements or indeed under the GATS.

Yet, the situation remains that EU industries and enterprises who may be able to invoke the TBR procedure to enforce obligations under bilateral agreements, the GATS or other kinds of international obligations are failing to do so. Conceivably, this could be simply due to a lack of awareness that the TBR procedure could be used in this context and a lack of depth in commitments made under the GATS. On the other hand, the TBR expressly excludes the possibility of EU enterprises from relying on bilateral agreements as a basis for a TBR
complaint. This may be reflected in the rather limited range of obligations that have been relied upon in past TBR cases.

**B: Non-Violation Nullification and Impairment**

Notwithstanding the definition provided in the TBR Regulation, which clearly contemplates this possibility, no TBR case has been initiated on the basis of the grounds of actions intended by the phrase gives rise on the part of the EU to “a right to seek elimination of the effect of the practice in question”. In the context of WTO jurisprudence, in certain circumstances, action may be taken under the WTO DSU where practices on the part of the EU’s trading partners “nullify or impair” benefits accruing to the EU under Article XXIII of the GATT 1994.

The Commission approach has been to focus on the existence of a breach of a legal obligation owed to the EU, primarily under the WTO rules. This approach has the benefit of a high degree of security in the event that a TBR investigation leads to WTO proceedings. Viewed in terms of the results obtained by the Commission’s TBR team in WTO dispute settlement proceedings, this approach has clearly been resoundingly endorsed. Equally, given that the EU itself is reluctant to proceed with WTO dispute settlement procedures based on the concept of nullification and impairment alone, this approach is also consistent with the general policy of the EU.

In our view, the acceptance of a TBR complaint based on anything other than a clear violation of the WTO obligations (and obligations contained in bilateral agreements) is the prudent course of action for the TBR team to follow. We see no reason for this approach to change other than in the most exceptional of circumstances.

**C: Bilateral Agreements**

As the TBR currently stands, while the definition of actionable obstacles to trade encompasses breach of bilateral non-WTO agreements, complainants proceeding through the EU enterprise procedure under Article 4(1) of the TBR (trade barriers in export markets) are expressly precluded from relying on these kinds of agreements for the purposes of establishing an actionable obstacle to trade. Only EU industries could rely on infraction of these kinds of duties when formulating their complaints of obstacles to trade having an impact inside the EU market under Article 3(1) of the TBR.
Users of the TBR have consistently found the procedure contained in Article 4(1) of the TBR to be more appealing, probably because most of the trade barriers cited in past complaints have involved impediments to access in export markets. This automatically leads to the exclusion of the possibility of relying on bilateral agreements to determine the existence of actionable obstacles. Unless an obstacle to trade falls into the relatively limited range of trade practices that have an effect inside the EU, the possibility of relying on obligations contained in bilateral agreements is completely excluded.

Even although the EU has traditionally been keen to establish an extensive network of bilateral agreements, especially among its proximate trading partners, and despite the often highly technical and comprehensive nature of the commitments in these agreements, the main failing of these agreements has been in the structure of their dispute settlement provisions. With the exception of the EEA, all pre-2000 free trade agreements established by the EU were based on the traditional diplomatic approach to dispute avoidance and resolution. In the event of a dispute, reference is typically made in these kinds of agreements to the resolution of disputes through a decision adopted by consensus at the relevant inter-governmental association council. In the event that a problem cannot be resolved in this context, often provision is made for some form of arbitration. However, this procedure has serious weaknesses because a consensus is generally needed to establish an arbitration panel, the procedure is not regulated or subject to time limits and there are no procedures for ensuring compliance with an arbitration ruling.

It is common knowledge that few disputes were ever effectively resolved this way. On the contrary, the situation often developed that trade disputes were repeatedly placed on the agendas of association council meetings year after year without being resolved.

In the one main TBR investigation where a bilateral agreement featured quite prominently, Turkey – Pharmaceuticals, the resolution of one main EU industry concerns, namely data exclusivity protection, was pursued in the context of the bilateral framework in place between Turkey and the EU. The suggestion was made that arbitration could be pursued to resolve this issue but the proposal for arbitration by the European Court of Justice was rejected by the Turkish government.
This was because both sides have to agree on the form of arbitration and the proper forum.

Since 2000, this situation has changed quite dramatically and the EU has pursued a policy of enshrining a more legalised model of dispute settlement in its more recently negotiated free trade agreements. In the EU-Mexico and EU-Chile free trade agreements, more effective dispute settlement provisions have been inserted. Effectively, the need for a consensus between the parties to refer a dispute to arbitration has disappeared. Mandatory consultation periods have been put in place after which arbitration panels can be established to consider disputes. These arbitration panels are required to issue their reports within a defined time frame. More importantly, compliance procedures have been inserted based on the WTO DSU. There are clear rules on “sequencing” and a procedure for verifying if compliance has taken place. If not concessions made under these agreements by the prevailing party can be suspended. All these compliance actions are required to happen within a relatively short time frame.

This move away from diplomatic style dispute settlement and towards legalised dispute settlement based on the WTO DSU model strongly suggests that reliance on these bilateral instruments is now justified when formulating a TBR complaint. To the extent that these kinds of agreements contain robust substantive obligations and better defined dispute settlement procedures, there seem little justification for not allowing EU enterprises to refer to them when bringing complaints under Article 4(1) of the TBR against obstacles to trade in export markets.

Hence, we recommend that the TBR is revised to remove the restriction contained in Article 4(1) of the instrument which prevents EU enterprises and associations thereof from relying on the obligations contained in bilateral trade agreements which the EU has entered into with some of its trading partners.

**D: Services and the GATS**

The TBR apparently extends the coverage of the concept of actionable obstacles to trade to market access barriers faced by EU service providers abroad. EU industries and enterprises engaged in providing services are both expressly identified in Articles 3(1) and 4(1) of the TBR as having standing to lodge complaints. The definition of obstacles
to trade covers international trade rules established under the WTO and its Annexes, and the General Agreement on Trade in Services (GATS) forms Annex 1B to the WTO Agreement.

In contrast, no TBR complaint has been lodged by an EU enterprise or industry alleging obstacles to trade being maintained in the service sector of a third country. There have been instances of enquires being made of the TBR unit as to whether or not the TBR can be invoked in this context but to date no services-based complaint has emerged.

Feedback from the EU services sector as part of this Study plainly indicates that they are facing sometimes serious barriers to trade in certain countries. The telecommunications and the construction services sectors in particular have reported significant barriers to entering the markets, for example, in China and India. Trade in services accounts for an increasingly large proportion of GDP in the EU. This trend is likely to continue which, in turn, means that the removal of obstacles to trade in foreign countries will assume even greater importance in the future.

Initially at least, there appears to have been some confusion as to the extent to which the TBR applied to services. This was because Article 2(8) of the TBR states: “For the purposes of this Regulation, the term 'services' shall be taken to mean those services in respect of which international agreements can be concluded by the EU on the basis of Article 113 (now Article 133) of the Treaty.” This is a reference to the division of competence between the EU and the Member States under the Common Commercial Policy in Article 133 of the EC Treaty. With regard to trade in services and specifically the GATS, the ECJ decided in Opinion 1/94 that the EC has exclusive competence to conclude international agreements concerning cross-border (mode 1) trade in services in all services sectors (i.e., the supply of services from the territory of one member of the agreement into the territory of any other member) as well as agreements covering all other modes of supply (i.e., mode 2-4, consumption abroad, commercial presence and movement of natural persons) in areas where the EU has already exercised an internal competence. Other activities fell within the mixed or shared competence of the EU and the Member States.

If the EU had limited ability to exercise exclusive competence in negotiating international agreements relating to services, then it was logical that the enforcement of these obligations, including action under
the TBR, was similarly restricted. For this reason, Sir Leon Brittan affirmed that the TBR’s scope would be “restricted to... areas of exclusive EU competence (trade in goods and services not implying the movement of persons).” 44 One example where the competence of the EU was an issue is US-Cross-Border Music Copyright.

Impediments to the use of the TBR in pursuing obstacles to trade in services have however to some extent been removed by the amendments made to Article 133 by the Treaty of Nice15 which made changes to the above described situation. The new Article 133 extends, subject to certain important limitations, the EC’s exclusive competence for cross-border trade in services to all other modes of supply.

The question is whether these initial complexities have discouraged TBR cases in the services field. The EC Commission’s TBR team has confirmed that they are ready to accept TBR complaints concerning claims of barriers to trade in services and that any initial uncertainties concerning the scope of the application of the TBR in this context have been resolved. The amendment made by the Treaty of Nice has expanded the potential scope for action in the services sector and, in any event, any issue of enforcing obligations where the competence is mixed or shared can be overcome with proper consultations with the Member States in the TBR Committee.

Hence, the explanation for the lack of TBR cases dealing with trade in services is not linked to the definition of actionable obstacle to trade set out in the TBR itself. Rather, two factors appear to explain this situation more accurately.

First, the lack of TBR cases involving the services sector is probably due to the low level of commitments in the GATS and the general nature of trade in services. Hence, the legal basis for challenging obstacles to trade preventing the export of services is generally lacking. The jurisprudence in this field is continuing to develop. This is also mirrored at the WTO level where very few cases involving services have been handled under the dispute settlement mechanism. This situation could change if the current GATS negotiations are successfully concluded.

Second, there is a lack of awareness in the EU services sector of the possibility of bringing TBR cases to improve market access for
services even where the proper GATS commitments are in place. The problem is therefore not structural but based on lack of knowledge.

2. Injury and Adverse Trade Effects

A: General

It should be recalled at the outset that both past TBR users, and EU industry generally, perceived that the need to satisfy the requirements of establishing adverse trade effects and/or injury are the most onerous aspects of preparing a TBR complaint.

B: Adverse trade effects

Once the Commission establishes that there is one or more illegal obstacles to trade in the foreign market identified in the complaint, it has to investigate whether these obstacles to trade causes or threatens to cause adverse trade effects within the EU generally, a region thereof or a sector of economic activity therein. According to the TBR Regulation:

“Adverse trade effects may arise, *inter alia*, in situations in which trade flows concerning a product or service are prevented, impeded or diverted as a result of any obstacle to trade,

or

from situations in which obstacles to trade have materially affected the supply or inputs (e.g. parts and components or raw materials) to EU enterprises.”

In ascertaining the existence of actual adverse trade effects, the EC Commission is instructed to examine three factors, where relevant for making this assessment:

*Volumes of EU imports or exports*

The profile of foreign imports, on the one hand, and EU exports on the other gives some indication of the degree of injury being suffered by a complaining EU industry. Increasing volumes of
imports would support the allegation that injury is being sustained while declining EU exports would indicate the same.

*Prices of foreign competitors*

The next injury indicator is the prices charged by the EU industry’s competitors either inside the EU or in third country markets. A key factor here is whether foreign competitors are charging prices that significantly undercut those charged by EU industries for similar products or services.

*Impact on the EU industry*

To establish the existence of injury, it is also necessary to examine how the volumes and prices of the foreign products or services have had a negative impact on the health of the EU industry. Again the TBR contains a list of economic factors that can be examined to demonstrate this negative effect. These include trends relating to production, utilisation of capacity, stocks, sales and market shares, prices, profits, return on capital and investment and employment levels.

Adverse trade effects have typically amounted to loss of export opportunities, loss of competitiveness, decrease in market shares, extra costs, loss of profits, damage to reputation and ultimately company closures and job losses etc. Sometimes, the mere uncertainty of the applicable rules in a market can have such effects. For example in *Japan–Leather* the uncertainty for European exporters concerning the allocation of tariff quotas prevented these exporters to penetrate the Japanese market.

In contrast, in another case, *US–Prepared Mustard*, the TBR complaint was rejected following the investigation because the alleged adverse trade effects did not appear to stem from the obstacle to trade claimed in the complaint. This particular complaint concerned discriminatory US retaliatory measures following the alleged non-implementation by the EU of the WTO *EC–Hormones* ruling. The US applied retaliatory measures against prepared mustard from all EU Member States except the UK. Since the UK did not export any such mustard to the US there were no adverse trade effects resulting from the US measure. This finding was upheld upon appeal in the EU Court of First Instance.
It is also possible for damage to be based on a threat of adverse trade effects if it is clearly foreseeable that a particular situation is likely to develop into actual adverse three effects. In one case, *Canada–Geographical Indications*, the Commission found that the obstacles to trade did not, at the time, cause any real trade effects, but that they “threatened to cause” such effects within the meaning of the TBR.

**C: Injury**

Where injury is the relevant standard for determining whether damage is being suffered by an EU industry in the case of obstacles to trade having an effect inside the EU (under Article 3(1) of the TBR), the same factors are examined by the EC Commission to make this assessment.

A TBR complaint can also be based on a threat of injury which again occurs when it is clearly foreseeable that a particular situation is likely to develop into actual injury. Two additional factors can also be examined by the Commission but the way in which these have been expressed seems to indicate that they have not been thought through properly. Both these additional factors appear to contemplate the possibility of taking into consideration elements occurring in markets other than inside the EU whereas the basic concept of “material injury” itself focused on effects inside the EU market.

**D: Assessment of the EC Commission’s Practice**

According to past users, it is not the actual criteria required to illustrate adverse trade effects or injury themselves that are the root of their perceived problems in meeting the required standard. Instead, it is scope of the information that is required to be provided and the amount of supporting evidence that is often requested.

It seems reasonable to assume that in most cases, only a limited number of these factors are relevant in the determination, on a case-by-case basis, whether adverse trade effects are being created by an obstacle to trade. Hence, it should not be necessary to provide information and/or evidence of all the economic indicators mentioned in the TBR Regulation. Allowing greater precision and specification to which economic indicators would adequately illustrate the damage caused by an obstacle to trade might alleviate this burden.
For example, one of the most powerful arguments of a complainant in support of adverse trade effects is that in absence of the measure, its market penetration would be higher. This can easily be measured in terms of sales volumes, lost sales, higher costs incurred for exporting products and market intelligence. Hence, the other factors mentioned in the TBR for identifying adverse trade effects would not be, strictly speaking, all that relevant in the case of an obstacle to trade in an export market.

Consequently, there is some merit in the argument that the factors mentioned in the TBR for establishing adverse trade effects and/or injury could be paired down to allow a more targeted and specific assessment of this aspect of the TBR’s requirements.

As far as evidence to support the allegations of adverse trade effects and/or injury is concerned, it is difficult to measure the weight of this claim based on the few TBR complaints we have seen. Certainly these complaints have been relatively short. Equally, based on our own experience of preparing TBR complaints for our clients, the evidential requirements do not seem any more burdensome than say in the case of an anti-dumping or anti-subsidy complaint. It should, of course, be borne in mind that a TBR complaint may trigger an international dispute settlement procedure which is a serious step for the EU to take.

On the other hand, some of these associations have limited resources and felt they were stretched in gathering the supporting evidence for their complaints. This is because some of the evidence and analysis has to be specially prepared (ie statistical data on the affected trade flows including factors such as volume of imports, exports, production, consumption on the third country market and or the EU market, in particular where there has been a significant variation, etc).

Our own experiences aside, the clear message from past users, as well as the opinions of many potential users, was that this aspect of the procedure is most taxing and inhibits the submission of potential complaints.
3. Causation

It is a fundamental principle of the TBR that the obstacle to trade must be the cause of the adverse trade effects or injury to the EU industry. This nexus is important. The European Commission has correctly taken a practical approach to this issue and there are no TBR cases where the EC Commission has proceeded with an investigation without evidence to support this causal link.

4. Material Impact of Adverse Trade Effects

The material impact requirement is derived from the need requirement that an EU enterprise must show that an obstacle to trade has effects which extend beyond its own commercial interests and have a material impact on the economy of the EU, a region of the EU or a sector of economic activity in the EU (Article 2(4) of the TBR Regulation).

*Prima facie*, this means that it must be established that the impact of the obstacle to trade is not confined to the complaining EU enterprise. Certainly, in the case of a single enterprise lodging a complaint, this would seem difficult to establish without the participation of other enterprises carrying on similar production inside the EU. For similar reasons, it might even be difficult for groups of EU producers to satisfy this requirement.

In practice, the difficulties of satisfying this requirement have not proved to be particularly onerous for two reasons. First, often the Commission has, in certain cases, been prepared to extrapolate the adverse effects on the complainant by considering the possible impact of the practice on the EU as a whole or particular industries or regions. Second, where a complainant represents an entire EU industry, region or sector, this requirement is automatically satisfied. Also, where a lower level of representation is represented in the complaint, the Commission has been willing to grant a certain degree of latitude. For example, in *Brazil - Sorbitol*, an adequately severe impact existed even although the complainant represented only 35% of the total EU productive capacity for the product.
The Commission’s practice indicates that an actual material impact on the economy of the EU as a whole as a result of adverse trade effects is not always required. Instead, the potential to cause such an effect has been relied on. This was demonstrated in *US - Anti-Dumping Act of 1916*. The complainant in this investigation was an organisation composed of the national steel federation of the majority of EU Member States. The complaint addressed the incompatibility of this statute with the WTO Anti-Dumping Agreement and specifically referred to proceedings that had been initiated against one of its members’ US affiliate companies. The statute was capable of applying to European companies and their subsidiaries in any sector, not only the steel sector. In these circumstances, the Commission accepted that the statute was capable of potentially applying to all EU exports and therefore had a material impact on the economy of the EU.

It has been more common to claim that the adverse trade effects have a material impact on a specific region of the EU rather than the economy of the EU as a whole. In *US - Textiles*, for example, the restrictions on imports of silk products had a material impact mainly focused on the Como area of Italy where most of the EU silk industry is present. Similarly, in *Argentina - Leather*, the impact was claimed to be on a number of regions of the EU, although these were not specifically identified. Individual EU Member States can also be considered a region of the EU for this purpose.

This flexible approach on the part of the Commission is to be commended. It has prevented the rejection of complaints where the impact of the adverse trade effects in question may have been, in financial terms, not large but significant measured relative to the interests of EU enterprises making complaints.

### 5. EU Interest

Taking action under the TBR must also be “in the interest of the EU”. The EU interest requirements would seem to imply that the Commission should weigh up the effects of adopting measures against the impact of such measures on the EU’s broader economic and commercial interests in much the same way as is required in EU anti-dumping and anti-subsidy law. It would only be if the balance of interest lies in the interests of taking action on behalf of the complaints that the EU interest requirement would be satisfied.
The judgment of the Court of First Instance in *Case T-317/02, Federation des Industries Condimentaires de France (FICF) and Others v European Commission* gave considerable guidance on the application of this concept in the context of the TBR. Effectively, it established five guidelines concerning the approach that should be adopted in TBR procedures:

- The European Commission is obliged to take into account the interests of the EU at three key stages of the procedure, namely: (i) at the time the examination procedure is being initiated; (ii) when, after an examination procedure has taken place, the interests of the EU do not require any action to be taken; and (iii) when it is necessary to take action to ensure the exercise of the EU’s rights under the international trade rules with a view to removing illegal obstacles to trade.

- The publication of a Notice of Initiation starting a TBR examination procedure in the interests of the EU does not prejudice the possibility that, at some later stage in the procedure, action may not be in the EU’s general and long-term interests.

- Different considerations may be taken into account in assessing the EU’s interests at the various stages of the TBR examination procedure.

- The European Commission enjoys wide powers of appraisal in making this assessment at each stage of the procedure.

- A decision on the part of the European Commission that action is not in the EU’s interests is valid as a means to terminate a TBR procedure even if the other substantive elements for a TBR case are found to be present.

In practice, the European Commission has rarely, if ever, declined to open a TBR examination procedure on the grounds that such an investigation is not in the EU’s interests. The Commission, rightly in our opinion, takes that view that the examination procedure provides an opportunity for a more thorough investigation of the facts and the claims made in the complaint. Other possibilities are available to the
Commission to deal with unmerited complaints, especially those failing to contain sufficient evidence.\textsuperscript{55}

It is only when action is required to tackle a foreign obstacle to trade that the issue of the EU’s interests really moves to the forefront in the investigation process. This was, of course, the situation in \textit{FICF v EC Commission}, supra. But this case remains the exception rather than the rule. One of the stated objectives of the TBR was to establish new and improved EU rules “to ensure the effective exercise of the rights of the EU under international trade rules.” Pursuing a pro-active approach to achieve this objective is a factor that weighs heavily in favour of presuming that action to remove a foreign obstacle to trade will, far more often than not, be in the EU’s interests.

It is therefore hardly surprising that, in the vast majority of TBR cases initiated so far, a predominant feature supporting action being in the EU interest has been the need to ensure that third countries fully comply with their commitments undertaken at the international level and, specifically, the WTO Agreements. It also follows that the same reasoning applies to ensuring that countries bring their legislation into conformity with their international obligations.

Other factors have been considered relevant in this appraisal. In cases where the obstacle to trade affects more than one EU industry, the EU interest in action will be greater. For example, in the \textit{US-1916 Anti-Dumping Act case} the US measure could potentially have been applied to all EU industry sectors exporting to the US. Also, in the three Brazilian cases concerning Sorbitol, textiles and Stainless steel, the EU was concerned that the Brazilian measure caused the same problems for EU industry in different markets.

Where different EU companies have diverging interests, there must be a balancing, or weighing, of the different interests at stake. In \textit{Colombia–VAT and Motor Vehicles}, the Commission, consequently, also examined the effect on Renault in pursuing the TBR complaint brought by Volkswagen. Similarly, in \textit{US-Rules of Origin for Textiles products}, the Commission noted that other EU companies than the ones filing the complaint had experienced difficulties and decreases in profitability. In many TBR cases, the Commission specifically expressly emphasises that the enforcement of a third country’s international obligations is in itself in the interest of the EU. Typically it is the country’s compliance with its WTO obligations that are at issue.
In summary, the EU interest test is an important aspect of the TBR Regulation and must be retained as a “safety value” for TBR cases that could potentially compromise the interests of the EU as a whole. The European Court of First Instance was, in our view, correct to grant the European Commission a wide margin of discretion in making this assessment at each stage of the TBR process where this concept comes into play.
7. Analysis of the Key Aspects of the TBR Procedure

1. Initiation Issues

A: Grounds for Evaluating Complaints

From the perspective simply of the size of EU industry and the scale of its export interests, the number of TBR cases opened over the course of the last ten years is not large. One possible explanation for this statistic is the standard applied in the pre-initiation evaluation of a potential complaint. In other words, are these standards too rigorous and, in turn, does this explain the low number of complaints that have gone through the TBR procedure?

It is difficult to estimate the amount of possible TBR complaints in which the Commission has not taken any further action and of which there is, consequently, no public record. No official statistics are kept in relation to this activity. A reasonable estimate is that there have been approximately 50–60 potential complaints during the life of the TBR. The quality and seriousness of these “complaints” varies greatly, from telephone enquiries received by members of the TBR team over time to preliminary and exploratory meetings with potential complainants. Approximately half of these complaints have, of course, materialised into full TBR investigations. Of the other thirty or so potential complaints, at least one-third failed to materialise in any formal form, whether this is a meeting with the TBR unit or a written submission formulating the basic elements of a TBR complaint. This leaves only around twenty that did not move from pre-initiation contacts to a formal complaint.

In providing its assessment of a potential complaint, the TBR team applies the following general principles:

- No complainant is actively discouraged from pursuing a TBR case and it is always the complainant that ultimately decides whether or not to file a formal complaint.
Once the Commission becomes aware of a potential complaint, it informs the complainant of the requirements for filing a formal TBR complaint and of the necessary evidence that needs to be gathered and offers the possibility of a meeting where possible; it also offers the possibility of reviewing draft complaints including annexes.

The Commission informs the applicant of its initial assessment of the applicant’s ability to meet these requirements.

The Commission does not view its role as actively to assist the complainant in gathering the evidence to support its complaint; on the other hand, it may be in touch with its delegation in the third country in question as well as other services inside the Commission to gain a fuller picture of the situation and, in such circumstances, additional evidence does sometimes emerge.

After these processes have been applied, only twenty complainants have exercised their right to insist on lodging a complaint.

The most common reason for not pursuing a formal complaint is lack of legal basis or lack of evidence supporting the case. In these cases it is obviously hard for the Commission to make a decision to act upon the complaint. Exceptionally, the Commission also finds that there are not sufficient trade effects or EU interest to pursue the case. In the majority of instances, this advice is accepted by the potential complaints.

**B: Rejection of complaints**

In making an assessment of a complaint and the available evidence, the Commission needs to take into consideration whether the complainant will be able to provide "sufficient evidence" to support the complaint, i.e., the Commission has to be sufficiently sure that the alleged problem really exists. This is the Commission’s duty under Articles 3(2) and 4(2) of the TBR.

Notwithstanding the Commission’s advice to the contrary, there have been instances where a complainant has insisted on filing the complaint. In these circumstances, the Commission is required to apply Article 5(1) of the TBR which provides that “where it becomes apparent after
consultations that the complaint does not provide sufficient evidence to justify initiating an investigation, then the complainant shall be so informed.” The Commission has exercised this authority on a number of occasions. The main grounds for doing so have been lack of evidence of the obstacle to trade and/or injury or adverse trade effects. In a very small number of cases the allegedly illegal measure in a foreign market has its equivalent in the EU legal system. If this is the case, it will naturally not be considered in the EU’s interest to pursue the removal of the contested measure via dispute settlement procedures that will establish a damaging precedent against the EU’s own interests.

Clearly the European Commission has broad latitude in making this assessment and this margin for discretion has been confirmed by the European Court of First Instance. The Commission has no express power to reject a complaint but, of course, may write to the complainant confirming this position. Most complaints are withdrawn without any public notice being issued if such a finding is made.

In one case, while expressing reservations on the merits of the complaint during the complaint review procedure, the European Commission nevertheless proceeded to open an examination procedure leading to a finding that the procedure should be terminated (US – Prepared Mustard).

**C: Assessment of Pre-Initiation Practice**

In our view, the EC Commission’s practice towards the vetting of complaints prior to a formal complaint is justified. It is not the function of the TBR team, as the instrument stands at the moment, to actively participate in the gathering of evidence to support or discourage a potential complaint. Prior to a formal complaint being lodged, its function should be purely advisory. It is, of course, fully entitled to inform a potential complainant that additional information and/or evidence is required prior to the receipt of a complaint. The supplementary question is, of course, the standard that such additional evidence must satisfy before the EC Commission will act.

Upon the formal lodging of a complaint, and the application of the relevant standards for reviewing that case as establishing a *prima facie* case, we share the view of past and potential users that a very high standard is being applied. However, the Commission’s pre-complaint
review practices do not appear in any way to limit the volume of cases accepted for formal examination under the TBR.

2. The Tracks for Accessing the TBR

A: EU enterprises and industries

To date, only one TBR complaint has been lodged exclusively under the EU industry procedure, namely US – Subsidies for Oilseeds Production. Two other complaints have been lodged on behalf of EU industries as a group namely Chilean – Swordfish and Brazilian – Proex Export Financing but in both instances additional reliance was also placed on standing under the EU enterprise procedure.

There are a number of explanations why the EU industry procedure has not been successful. First, and perhaps most obviously, the vast majority of TBR complaint have been lodged against barriers to trade in export markets. It is not necessary for a complainant to represent an EU industry in such circumstances. Equally, as mentioned elsewhere in this Report, few obstacles to trade have effects inside the EU.

It must also be pointed out that the requirements of qualifying as an “EU industry” for the purposes of a TBR complaint as user friendly as they could be. Again this is an instance of a concept apparently being borrowed from other EU commercial defence instruments and transposed into the TBR. In the first place, the TBR defines an EU industry as all EU producers or providers: (i) of products or services identical or similar to the product or service which is the subject of an obstacle to trade; (ii) of products or services competing directly with that product or service; or (iii) who are consumers or processors of the product or consumers or users of the service which is the subject of an obstacle to trade.”54 Since it is impractical in many cases to require that a complainant represents all EU producers, the TBR also allows complaints to be admissible as long as they represent “a major proportion” of the total EU production of the products or services. No definition of a major proportion is specified in the TBR Regulation.

It is possible that, in some industries (especially fragmented ones), difficulties arise in obtaining a sufficient degree of representation for a complaint, even using the major proportion rule. Sometimes producers that would otherwise be expected to participate in such a complaint are
reluctant to do so because of special relationships that they have with companies (or governments) in the country that would be the target of the complaint.

In only three instances have EU companies lodged TBR complaints, namely Cerestar BV, Dornier GmbH and Volkswagen. Since none of these companies participated in this Study, we can only draw general conclusions as to why this is the case. Reasons that have been given to us by potential users include fear of a damaging response from the government against which the TBR action is directed (particularly when investment has been made in that country), insufficient resources and expertise, anticipated additional costs as well as a general lack of understanding that the TBR may be used against foreign trade barriers.

The most successful track has been the EU enterprise route where associations representing individual enterprises have taken responsibility for pursuing the case. Complaints lodged on this basis account for more than 80% of TBR cases. There is no indication that the requirements set under the TBR for trade associations to acquire standing have posed any legal problems. Some past users have indicated that it has, on occasion, been difficult to obtain internal approvals and/or consensus for taking TBR action but this is a matter that is unrelated to the legal requirements set down in the TBR Regulation itself.

The extent to which the track established for EU industries to pursue action against obstacles to trade having an impact inside the EU should be retained depends on whether the concept of adverse trade affects can be modified in Article 10(4) of the TBR Regulation which presently identifies them as “situations in which trade flows concerning a product or service are prevented, impeded or diverted.” Substitution of the term “distorted” for “diverted” could extend this definition. Similarly, modification of the terms of Article 4(1) would be required to change the term “effect on the market of a third country” or “effect on the market of the EU or a third country.” Since the EC Commission is instructed to examine the same kinds of economic indicators for establishing both injury and adverse trade effects, little change would be required at this level.
B: Member State Referral Process

No EU Member State has yet availed itself of the possibility of referring an obstacle to trade to the attention of the European Commission. There appear to be three reasons why this is so:

- Member States are reluctant to accuse other countries of engaging in unfair trade practices for fear of some sort of response targeted against their specific national interests.

- Some Member States take the view the TBR is a trade policy instrument that should primarily be in the hands of EU industry and enterprises.

- Member States have the option of requesting international action through the 133 procedure.

Apprehension of targeted reprisals against the interests of specific Member States is probably not completely unfounded. In our own experience, we have observed certain EU countries refusing to use the Member State referral process against their non-EU neighbours for various political and economic reasons. Simply stated, why should an individual EU Member State expose itself in this why when other processes are available to achieve the same result without having to disclose the identity of the country backing the case?

In light of the above, there is little reason for believing that Member States will become more active in the TBR process. EU Member States have a strong preference for using the 133 procedure as opposed to the TBR and this has been confirmed in feedback received from the TBR Committee representatives.

3. The Scope of the Notice of Initiation

The Commission may investigate whether an allegedly illegal measure also violates other provisions than the ones specified in the complaint. Furthermore, once the Notice of Initiation is published, other interested parties might join the complaint and extend the scope of the products covered by the investigation. However, the Commission would, most probably, not expand the investigation to cover other allegedly
inconsistent measures in the country in question and certainly not to cover other countries in which the same illegal measures apply.

4. Time Lines

A: Pre-Initiation Assessment Period

Under the TBR, the Commission is required to take a decision as soon as possible on the opening of an EU examination procedure following the official lodging of a complaint by an EU industry, enterprise or association. This decision should “normally” be taken within 45 days of the lodging of the complaint.

The purpose of this period is to allow the Commission to assess the sufficiency of the evidence contained in the complaint to establish the existence of the substantive requirements imposed by the TBR. In practice, however, the EC Commission regularly exceeds this period of time between the complaint being lodged and the publication of the Notice of Initiation of the Examination Procedure. For example, in the four most recent cases, this time limit was exceeded by considerable latitude (Uruguay – Whisky (51 days); US – Subsidisation of Oilseeds Production (62 days); Turkey – Pharmaceutical Products (72 days); and Brazil – Retreaded Tyres (63 days)).

There is no doubt that the 45 day period specified for completing this exercise is a soft deadline to the extent that the Commission should “normally” take its decision within this time frame. On the other hand, it is simply in the interests of sound administration that any decision to initiate an examination procedure would normally be taken within this time frame unless there are exceptional circumstances. The persistent ignoring of this time limit is not helpful to the proper administration of the TBR especially in light of the criticism levelled by past (and potential) users that the TBR procedure itself takes too long to complete to be effective.

It is true that the 45 days pre-initiation period may be suspended at the request, or with the agreement of the complainant, in order to allow the provision of complementary information which may be needed to assess the validity of the complainant’s case. However, it seems anomalous that this option lies in the hands of the complainant rather than the investigating authority.
The origins of the 45 days time limit again appear to lie in a transposition from the EU’s other Commercial Policy Instruments. Closer examination of the internal procedures followed by the TBR team in gaining internal approvals of TBR actions strongly suggests that this transposition may be counter-productive. The 45 days that the Commission is granted to initiate a case is simply too short under the current Commission internal procedures. Once the Director General has approved a case, it has to go through inter-service consultations. This procedure takes two weeks unless the different DGs are not able to agree and the issue has to go to the College of Commissioners for approval. Thereafter, the Member States have to be consulted, a procedure that takes approximately one week.

In practice, the TBR team only has 5-7 working days to decide whether or not to support the initiation of a case if it is to meet the 45 days deadline. This time limit is difficult to meet unless the case handler has had substantial pre-initiation contacts with the complainant before the actual filing of the complaint. For this reason, this time period is regularly exceeded not because of tardiness on the part of the TBR team but simply due to the slowness of the internal approval process.

More importantly, this short deadline means that it is virtually impossible for the TBR unit to request additional information from a complaint (in the form of a measure akin to a Deficiency Letter in EU anti-dumping practice) to complement the pre-initiation analysis with additional evidence or information. Especially where little or no pre-initiation contacts have been conducted (which is the prerogative of the complainant), the application of this artificially short deadline tends, in our view at least, to suggest that inadequate time may be permitted for a full and proper analysis of a complaint.

Hence, we recommend that either the 45 days period granted under Article 5(4) of the TBR is extended to a more reasonable period or, alternatively, a fast track internal approval process is instigated inside the EC Commission to give more time to the TBR team to properly analyse complaints, request additional information and/or evidence and act within a prescribed time period which, in normal circumstances, should be respected.
B: Time Period for TBR Examination Procedure

After the EC Commission has concluded its examination procedure (which effectively is its investigation into the claims made in the complaint) it is required to present its report to the TBR Committee normally within a period of five months from the announcement of the initiation of the procedure unless the complexities of the investigation is such that the Commission requires to extend this period to seven months (Article 8(8) TBR Regulation).

Again the EC Commission regularly exceeds the permitted normal period, and even the extended period, although it cannot be the case that all TBR investigations are exceptional. Here the problem is more structural and results from the nature of the TBR investigative process. According to the TBR team, the 5-7 months are needed to investigate the legal claims (it is rare that a case is properly prepared by a lawyer) and gather the necessary evidence. The various stakeholders need to get a reasonable time period to answer to the questionnaires. Sometimes they request an extension. Once the questionnaires are returned, there might be new legal or factual issues to investigate. If the investigation is not done properly at this point it will have to be redone if the case is taken to WTO dispute settlement.

Ultimately, to bring practice in line with the prescribed time period, additional resources would be required by the TBR team within the Dispute Settlement Unit. Even so, the nature of the investigative process does not lend itself to an expedited investigation for the reasons mentioned above. Hence, it may be the case that a longer period for this kind of investigation is necessary. Equally, the extension of this period may also allow more time for the pursuit of a negotiated settlement to remove the obstacle to trade.

C: Time Period for the Activation of Formal Dispute Settlement Action

After the exhaustion of relatively strict time limits for the assessment of the admissibility of a complaint and the preparation of the Examination Report, the TBR Regulation makes no reference to any additional time periods for the pursuit of a negotiated settlement or, alternatively, the activation of formal dispute settlement procedures via the WTO or through an applicable bilateral agreement. Past and potential users of the TBR have pointed to this anomaly as a fundamental flaw in the fabric of the TBR.
There are, of course, two sides to the debate as to whether such a time limit is productive. On the one hand, the EC Commission would, and has, argued that the TBR must embody a degree of flexibility to allow the Commission to pursue the possibility of negotiated settlements as a means of removing trade barriers with trading partners. On the other hand, EU industry and trade associations have stressed that the apparent limbo into which TBR proceedings fall after the submission of the Examination Report to the TBR Committee takes away the teeth of the TBR as an instrument of achieving greater market access.

On balance, we tend to agree with the EU industry on this issue. The open-ended nature of this aspect of the TBR process has, at a minimum, the following negative effects:

- It undermines confidence in EU industry and enterprises that the EC Commission will take “courageous” action to pursue their interests.

- It encourages the EU’s trading partners to enter into open-ended negotiations with a view to prolonging discussions to maintain illegal obstacles to trade as long as possible. This is particularly so when strong interest groups are behind the obstacle to trade.

- It undermines the perception of the TBR as an instrument of EU commercial policy that can bring about a solution to a market access issue in the short-to-medium term.

- It discourages EU industries and enterprises in making the resource commitments to pursue action under the TBR when there is uncertainty as to the ultimate action the EU is committed to take to resolve their problems.

- It gives a perception (real or otherwise) that the TBR is not immune to political influence when it comes to action required to remove an obstacle to trade.

- It promotes the attractiveness of other possible remedies including the use of the Article 133 procedure for accessing the WTO dispute settlement processes.
In our view (and that of the EU industry expressing their views), the automatic triggering of WTO dispute settlement procedures, action under the dispute resolution provisions of bilateral trade agreements, or indeed both, within a defined time period would be the single most significant enhancement of the TBR as an effective instrument for tackling barriers impeding market access. It would act as a catalyst for EU industry to use the TBR as a means of bringing trading partners maintaining illegal obstacles to trade to account under the threat of an effective process, namely the WTO dispute settlement procedures. At the same time, it would dispel the perception among EU industry that the TBR is too prone to being manipulated by trading partners.

Equally, there are sound reasons under EU law as to why such a time limit should be imposed. During this apparent legal limbo, neither the complaining EU industry nor the EU institutions have legal certainty as to their respective rights and obligations. This cannot be an acceptable state of affairs for either side. Hence, clarification of this issue is desirable.

What this period should be is, of course, open to debate. In our view, a period of six months from the date of the submission of the Examination Report to the TBR Committee is reasonable for a number of reasons. First, in totality, the TBR procedure itself would last a total of approximately 12 months (in normal circumstances) from the date of the lodging of the complaint to the initiation of formal dispute settlement procedures. This is a reasonable period for a trading partner to suggest a resolution to remove the offending barrier to trade without triggering formal WTO procedures. Second, it would also instil confidence in EU industry that a trade partner maintaining an illegal obstacle to trade would be promptly brought to account under the TBR. Finally, it would focus the attentions of a recalcitrant trading partner on the need for removing an illegal trade barrier.

It is, of course, evident that a decision to initiate WTO dispute settlement procedures (or the equivalent steps under a bilateral trade agreement) within a prescribed time frame would not circumvent the need for the EU to follow the proper procedures prescribed by Article 12(2) of the TBR to respect “the prior discharge of an international procedure for consultation” before commencing a formal WTO dispute settlement procedure. Negotiation of a satisfactory settlement within the context of the consultation procedure would therefore remain open.
D: Judicial Review of Time Periods

It should be noted that, although the TBR establishes time limits for the Commission’s investigation, the European Court of First Instance has recently ruled that the fact that the Commission, to a certain extent, exceeds these time limits, is not sufficient in law to invalidate the TBR report in question. This is, of course, in contrast to the opinions of EU trade associations and, in particular past TBR users, who have expressed considerable dissatisfaction in relation to this aspect of the TBR procedure.

5. The Examination Report and Subsequent Action

A: Investigative actions

Once a Notice of Initiation of a TBR Examination Procedure has been published, the Commission’s TBR team conducts its investigation into the claims made in the complaint with a view to preparing an Examination Report. This investigation is centred on validating the factual and legal claims made in the complaint.

Typically, questionnaires with questions concerning the third country legislation and contested practices, the product subject to the investigation, the third country and EU industries and the adverse effects claimed by the complainant are sent to various stakeholders in the investigation including EU producers and their associations, the authorities in the third country as well as the third country industries and associations.

The questionnaires are usually effective as a tool for collecting information. They also help the Commission to grasp the full picture of the problems in the industry in question. While the complainant, for obvious reasons, is usually cooperative in returning the questionnaires, the authorities in third countries as well as the third country industry might be cooperative depending on the case.

The questionnaires are sometimes lengthy and demanding. However, from the EU point of view, detailed questionnaires are necessary in order to efficiently gather all evidence that might be needed in possible future WTO dispute settlement. Contrary to the situation in anti-dumping cases, for example, the Commission needs all the facts in the
case to be able to pursue a TBR case. There is no express power to draw conclusions based on the facts available.

Although the absence of this power is unfortunate, there is no real alternative. WTO dispute settlement procedures do not allow parties to plead their cases based on their assessment of the best facts available. Hence, granting such a power runs the very real risk of difficulties emerging in any subsequent WTO dispute settlement proceedings.

Once the questionnaires have been returned, verification visits are usually conducted both in the EU and in the third country in question. Meetings with selected specialists may also be carried out. Important information is also gathered through the Commission delegations in third countries and through Internet resources.

The current system for gathering evidence has, in most cases, been effective. It is necessary to preserve the current detailed and lengthy procedure for collecting evidence or otherwise there is a risk that the evidence collected will not suffice in WTO procedures and that the collection of evidence will have to be redone if the case proceeds to the WTO.

**B: Average time period**

The time for reaching a decision on starting WTO consultations, or terminating the procedure, has varied immensely throughout the different cases. The average period of time is nine months from the date of the date of the complaint. The quickest cases so far have been the Brazil—Stainless steel case and the Korea—Shipbuilding cases that each took about 6 to 6½ months to complete. Also, in two other cases (Brazil—Sorbitol and US—Textiles) the Commission decided to take the case to the WTO dispute settlement procedures before issuing a final report to the Member States.

**C: Adoption of Commercial Policy Measures**

Where the EU finds, after the examination procedure has been completed, that action is necessary in the interests of the EU in order to remove the injury or adverse trade effects resulting from an obstacle to trade maintained by a third country, the appropriate countermeasures or sanctions may be adopted in accordance with the procedures set out in the TBR.
Three forms of retaliation are expressly recognized in such circumstances:

- The suspension or withdrawal of any concession resulting from commercial policy negotiations.

- The raising of existing customs duties or the introduction of any other charge on imports.

- The introduction of quantitative restrictions or any other measures modifying import or export conditions or otherwise affecting trade with the third country concerned.

Where the EU’s international obligations require “the prior discharge” of an international dispute settlement procedure, retaliatory measures can only be decided on after the applicable procedure has been “terminated”. In all the TBR cases to date, the applicable dispute settlement processes have been those prescribed under the WTO Agreement. The EU is bound under the DSU to resolve disputes with WTO members through the WTO dispute settlement procedure. This is evident from Article 23(1) of the DSU. The pursuit and/or application of unilateral counter-measures by the EU against a WTO Member, without first pursuing a solution through the prescribed WTO dispute settlement procedures, would not only infringe the applicable provisions of the TBR, but would also violate this international legal obligation. Additional obligations are also imposed on the EU under the DSU in this respect.

The second safeguard imposed by the TBR is that any retaliatory measures adopted must take “account” of the results rendered in international dispute settlement proceedings. The need to take “account” of dispute settlement rulings suggests that the EU has a degree of latitude in this process otherwise it might have been expected that its discretion would have been more strictly circumscribed. In the case of proceedings initiated under the WTO dispute settlement procedure, this requirement is made more specific. The TBR requires that, where the EU has requested the DSB to indicate and authorise the measures which are appropriate for the implementation of the results of the dispute settlement procedure, the counter-measures adopted under the TBR must be in accordance with the recommendations of the DSB.
The Commission has fully respected these safeguards and in no TBR proceedings has the use of countermeasures been threatened. It is true that few TBR investigations have reached the stage of counter-measures being approved but at the same time this results from a strict adherence by the Commission to the pursuit of the appropriate dispute settlement procedures. The fact that TBR complaints are presently going through the WTO dispute settlement procedures is testament to this fact. There has been no indication, or threat, of any other remedy being pursued.

6. Lessons from Abroad

Before concluding this aspect of our analysis, we thought that it would be useful to compare the TBR with its counterpart in the United States, namely the Section 301 family of US trade laws both from the procedural and substantive aspects. The purpose of this analysis is simply to see if fresh insights could be gleaned from the practice of one of the EU’s main trading partners. It is an interesting exercise to compare the two instruments to ascertain whether any obvious improvements can be made to the TBR from the US experience.

A: The US Section 301 System

Section 301 of the US Trade Act of 1974 provides a mechanism for the United States to take retaliatory actions against unfair trade practices by foreign countries that harm US commerce. Investigations of foreign trade practices under Section 301 and its accompanying provisions, Sections 302 through 310, are conducted by the office of the US Trade Representative.56 In addition to Section 301, there are also procedures specifically created to protect intellectual property rights abroad, known as “Special 301,” and procedures intended to ensure compliance by foreign countries to open their telecommunications markets, known as “Telecommunications 301.”

Investigation Procedures

There are two ways to commence a Section 301 investigation. First, an interested party may file a petition containing supporting allegations with the USTR to request that action be taken under Section 301. In this situation, the USTR must decide whether to initiate an investigation within 45 days of receiving the petition and follow statutory requirements for proper publication. The USTR must allow for public comment and a hearing, if requested, when it initiates an investigation
based on a petition. Second, the USTR can self-initiate an investigation under Section 301. Since the enactment of the statute in 1974, the USTR has initiated 121 investigations pursuant to Section 301.

The TBR has a similar 45 day pre-initiation period but, in contrast to the situation under the TBR, the USTR is required to respect this time limit. In other words, it is not a soft time limit but in fact a hard one. One might ask why the USTR invariably meets this deadline while the EC Commission does not. There is no evidence to suggest that respecting this deadline leads to an excessive rejection of complaints.

The USTR also has the power to self-initiate Section 301 investigations while the TBR does not contain such an authority. Although this authority is seldom used, it does seem useful to us. On the other hand, in a roundabout way, the European Commission, in conjunction with the Member States, has this power under the Article 133 procedure.

*Initiation of WTO Dispute Settlement Proceedings*

After a Section 301 investigation is commenced, the USTR must request consultations with the foreign country whose practices are at issue in the investigation. In the case that a violation of a trade agreement, such as the WTO Agreement, is involved and no resolution is reached in the appropriate time frame, the USTR must proceed under the formal dispute settlement procedures.

We believe that this is a considerable improvement to the situation under the TBR where the EC Commission has complete discretion on the subject of initiation formal WTO dispute settlement procedures.

*Action Under Section 301*

If the USTR determines that: (1) a foreign country’s actions deny, violate or are inconsistent with US rights or benefits under any trade agreement or (2) its acts, policies or practices are unjustifiable and burden or restrict US commerce, it is required to take action to enforce US rights or to bring an end to the foreign country’s action. US retaliatory actions must be designed to impact the goods and services of the foreign country “in an amount that is equivalent in value to the burden or restriction being imposed by that country on United States commerce.”
The USTR is not required to take action if the WTO Dispute Settlement Body has determined that the rights of the US under a trade agreement are not being denied or that the actions of the foreign government in dispute do not violate the rights of the US or deny or impair US benefits under a trade agreement. In addition, the USTR need not take action if it determines that the foreign country: (1) is taking satisfactory measures to act in accordance with a trade agreement, (2) has agreed to eliminate or phase out the offensive action or to some other satisfactory solution or (3) has agreed to provide compensatory trade benefits.

Clearly the scope of Section 301 is wider in terms of the actionable obstacles to trade than under the TBR. For that reason, we believe that the provisions of the TBR are more favourable from the point of view of international legality. On the other hand, the fact that the USTR is required to follow through on the authorisation of compensatory measures following a favourable WTO ruling, unless serious action is taken by its trading partners, underscores the strength of this instrument.

**Scope of Retaliatory Action**

Certain guidelines shape the USTR’s action in deciding on what action to take. The USTR can take retaliatory action against any goods or economic sector regardless of whether the goods or economic sector were the subject of the offensive action by the foreign country, provided the USTR’s actions are on a discriminatory basis or solely against the foreign country involved. In the case of compensatory trade benefits, the compensation must benefit the domestic industry or a related economic sector that would benefit from the elimination of the foreign country’s action unless this is not feasible or benefit to another economic sector would be more satisfactory. If the USTR chooses to take action in the form of import restrictions, preference will be given to the imposition of duties over other forms of restrictions.
B: Other Members of the Section 301 Family

“Special 301” allows the United States to monitor, protect and develop intellectual property rights (“IPR”) protection abroad. Each year, the USTR must identify foreign countries that deny “adequate and effective protection from intellectual property rights” or “fair and equitable market access for persons that rely on intellectual property protection.” Once the USTR identifies countries that have the “most onerous or egregious” acts, policies or practices that have the greatest actual or potential adverse impact on relevant US products, those countries are designated as “Priority Foreign Countries” unless they are making good faith negotiations to strengthen IPR protection. In addition, the USTR can place other countries where there are particular problems regarding IPR protection, enforcement, or market access for persons relying on intellectual property on the “Priority Watch List” or the “Watch List.”

Telecommunications 301 is designed to ensure that foreign countries comply with their commitments to open their telecommunications markets. For a Telecommunications 301 case, the USTR is required to review, by March 31 of each year, all trade agreements that involve telecommunications services and products to determine whether any act, practice or policy of a foreign country violates the terms of the agreement or otherwise denies “mutually advantageous market opportunities to telecommunications products and services of US firms in that country.”

“Super 301” was designed to examine trade practices of foreign countries that have the most significant trade barriers. It required the USTR to examine US trade expansion priorities and “identify priority foreign country practices, the elimination of which is likely to have the most significant potential to increase US exports.” Super 301 was re-instituted three times after its original creation, but it expired and was not renewed in 2001.

These variations on the theme of Section 301 are obviously not suitable models for incorporation into the TBR for a number of reasons. Conversely, they provide interesting models for the Market Access Unit to consider in future barrier removal programme contemplated under the EU competitiveness strategy.
1. The Framework of Decision-Making under the TBR

The European Commission is mainly responsible for administering the TBR and, in discharging its responsibilities, it acts in conjunction with committees of representatives from each of the 25 Member States. The two most important Member State representative committees are the TBR Committee and the 133 Committee. At certain stages of the TBR process, the Council of Ministers approves the relevant measures, acting on the whole on the basis of proposals from the Commission.

The Commission therefore plays the central role in the TBR process subject to its obligations to report its actions through the inter-institutional framework that has been established and also to the exercise of certain powers by the Council.

The European Parliament, in contrast, has little direct institutional participation in the TBR investigation process or the decisions to take action against illegal foreign obstacles to trade. On occasion, individual Members of the European Parliament have submitted written questions to the European Commission regarding individual actions under the TBR. There are, however, no direct or indirect institutionalised links between the European Parliament and the functioning of the TBR.

Nor has the European Parliament sought to have actions under the TBR reported to it on a regular basis. Unlike the EU’s other trade instruments, specifically the anti-dumping and anti-subsidy regulation, the European Parliament has shown little interest in receiving annual reports summarising actions under the TBR.

A: The Responsibilities of the European Commission

Inside the European Commission, the TBR team (which is part of the Dispute Settlement Unit) handles TBR complaints essentially from start
to finish. The TBR team has the following principal tasks and responsibilities:

► The examination and review of complaints.

► Investigation of the allegations made in the complaint.

► Pursuit of bilateral negotiations with the relevant government officials of the country accused of maintaining the trade barrier.

► Preparation of EU measures necessary to initiate dispute settlement procedures at the WTO level.

► Drafting proposals for action on the part of the Council.

The Commission is therefore the driving force behind the operation of the TBR and, from the point of view of EU industries and enterprises, is the principal point of contact. Its administrative responsibilities and functions also give it significant influence over the operation of the instrument as a whole.

It is the Commission, for example, that decides whether a complaint is admissible, whether an actionable obstacle to trade exists and if the other procedural requirements are satisfied. Equally, it investigates the case on behalf of EU industries and enterprises against the countries alleged to be infringing the international trading rules. Ultimately, it is the Commission that proposes the best course of action at the international level to resolve the dispute.

The European Commission’s TBR Team consists of approximately eight officials who form part of the Dispute Settlement Unit and who are directly involved in the operation of the TBR. The TBR team gathers the evidence in the dispute settlement cases while the Commission Legal Service writes the WTO submissions and pleads WTO dispute settlement case in Geneva if such actions become necessary.
B: Interaction with the Member States

The interface between the Commission and the Member States essentially takes the form of the reporting obligations that the Commission owes to the TBR Committee. The TBR Committee is composed of representatives from the 25 Member States together with a senior level Commission official who acts as chairperson. Its role is, strictly speaking, “advisory”. The interaction between the Commission and the TBR Committee is designed to ensure that the actions taken by the Commission are not against the interests of a significant number of the Member States. Moreover, the consultation process ensures that, if countermeasures need to be adopted by the Council of Ministers, the necessary support for such action will already have been generated among the Member States.

The Commission is required to consult with the TBR Committee at certain important stages in the TBR decision-making processes. In practice, the Commission consults with the TBR Committee once a properly documented complaint has been received prior to the publication of the Notice of Initiation and updates the Committee on progress towards negotiated settlements. The Commission also requests the views of the TBR Committee prior to action being taken at WTO level or when proposing to terminate a TBR procedure.

The Commission is also required to keep the Committee informed of all developments that are notified to the TBR Committee to allow the Committee to “consider any wider implications for the common commercial policy” action under the TBR. Again the Committee has no express powers to intervene in TBR proceedings but the overriding need to maintain consistency in the EU’s external relations policy justifies this involvement.

2. Evaluation of Interaction

A: The Views of the European Commission

Generally speaking, the European Commission views the present institutional structure as working well. There are clear lines of responsibility in the TBR Regulation for the tasks and functions of the European Commission, on the one hand, and those of the Member States on the other.
We have observed that the Commission seems to demonstrate considerable deference to the opinions expressed by the Committee members. Moreover, the relationship between the two sides appears to be a constructive one rather than confrontational.

**B: The Views of the Member States**

We were able to obtain considerable assistance for this part of the evaluation from the Member State representatives on the TBR Committee.

*Views on the Role of the TBR Committee*

Most TBR Committee representatives saw their role in the institutional process as advising on the merits, or otherwise, of complaints made under the TBR and to help ensure that the operation of the Regulation complements the work of the Commission in other areas of trade policy. According to them, the TBR Committee should ideally investigate, follow and monitor the complaints about the obstacle of trade and play an active role in the negotiations with the third party involved. Monitoring progress with regard to TBR cases, working towards greater awareness of the potential of TBR procedures and giving guidance to the European Commission as appropriate was also mentioned.

One or two Member State representatives saw their function as to make sure that the European Commission acts on the basis of sufficient factual and legal evidence and to encourage a careful decision-making process. This attitude is not inconsistent with the views expressed above.

In summary, the views of the Member States representatives were that, from a general perspective, the current EU institutional framework could be considered adequate.

*Relationship with the 133 Committee*

The general view was also expressed that the relationship between the 133 Committee and the European Commission in the TBR process was also useful. This was because the 133 Committee was seen as being more flexible, meets more frequently (usually once a week) and has an overall advisory role in the field of common trade policy.
Part of the reason why the 133 Committee should be involved in TBR matters was because of its importance in formulating general EU trade policy. It should also be remembered that 133 Committee is a Council body where Member States can more easily influence issues to be discussed than in comitology committees such as TBR Committee. Hence, it is not surprising that support for the retention of the involvement of the 133 Committee was expressed by Member State representatives.

*Quality of Communication*

A common theme mentioned was a need for more regular updating of the TBR Committee on the progress of cases by the European Commission and more regular distribution of updated fiches with new developments highlighted. Communication and information about the TBR cases could be improved. Specifically, reporting on the state of play of pending TBR cases was considered not sufficient.

TBR Committee meetings should either be organised more often or written status reports sent more frequently, including the plan of action on how the Commission is trying to solve the problems. The reports should also be detailed enough which apparently has not been the case in recent written reports.

Apparently sometimes investigation reports are sent to the Member States a few weeks after a TBR Committee meeting with the request to make written comments. The Committee members would prefer to receive these reports beforehand. This would make it possible for them to discuss the reports orally and understand the view of other Committee members. Almost all representatives expressed the view that the Commission’s reports should be made available quite in advance of the TBR Committee meetings.

It was also suggested that perhaps the Commission could keep updated files of cases on a password protected webpage in order to allow Member States to follow the development better, since TBR meetings are few. It would be advantageous if this was connected to the market access database.
Methods of Consultation

Member State representatives considered that regular TBR Committee meetings were important but could be better arranged. For example, it was suggested that the TBR Committee should meet more often, based on a pre-established calendar similar to what happens with the Anti-dumping Committee.

Human Resource Issues

Some TBR Committee representatives mentioned that the present institutional structure works well from the point of view of human resource commitment in the national capitals. The fact that the EC Commission shoulders most of the responsibilities for reviewing complaints, carrying our investigations and negotiating settlements, shifts a considerable burden from the Member States to the EC Commission. Since the Member States have confidence in the EC Commission, they do not need to remain large numbers of experts to participate in the TBR process.

A number of representatives mentioned that their governments were restructuring their departments and, in many cases, the number of government officials was being decreased. Effectively, the carrying out of the work on the TBR by the EC Commission was considered as giving rise to cost savings for the Member States. This was particularly important for the smaller Member States.

Independent Functioning of the TBR Instrument

We also asked whether the TBR was sufficiently transparent in terms of procedure and free from political interference. The general opinion was that the TBR process seems to be built, to the extent possible, on an objective analysis of relevant factors and therefore decision-making is based more on objective criteria than may be otherwise.

The Commission has apparently demonstrated a keen, and necessary, political awareness in the approach it has taken to some complaints. Coordination with the 133 Committee could potentially lead to the introduction of a political element but to date there was not much evidence of this happening. Obviously the 133 Committee looks at TBR cases in a broader trade policy framework.
The main area where political influence was thought to creep in was in the pursuit of negotiated settlements and potential action to remove obstacles to trade. So, for example, the view was offered that the EU’s overall bilateral (political and trade) relation with a country influences its choice of instruments (bilateral or multilateral means) when trying to solve the problem with the country. Apparently tackling trade barriers with the United States well illustrate this situation. Generally it was thought acceptable that, in some cases, when negotiating with a third country a solution to overcome a damaging barrier to trade, it can be necessary to make a political trade-off to achieve satisfactorily that solution.

3. Proposed Institutional and Structural Changes

The Member State representatives had a number of suggestions for the reform of the TBR, both institutionally and structurally, and this seems the appropriate point in this Study to refer to some of them.

A: Self-Activation of the TBR by the EC Commission

Somewhat surprisingly, broad support came from the Member State representatives for the suggestion that the TBR procedure should be activated more frequently by the Commission itself within its Market Access Strategy, and not only by the Member States or the EU industry, because the Regulation establishes a set of procedures to assess the market access obstacles, with deadlines to accomplish and to achieve results, bringing some method to that assessment.

Such a power should not, however, be used in a way that undermines EU industries and enterprises as the principal driving forces behind the TBR. It was universally agreed that the companies should have primary responsibility to lodge complaints in order to re-establish a level and competitive playing field. It is better to use resources in fields where problems are identified by the industry itself.

It is difficult to see how this suggestion could be implemented even with radical restructuring of the TBR. As mentioned elsewhere in this Report, the European Commission, in conjunction with the Member States, has this power under the 133 procedure and uses it on a regular basis. The creation of a power to self-initiate under the TBR could be viewed as unnecessary duplication.
B: Relationship with the Market Access Strategy

As regards the interaction between the TBR and the Market Access Strategy, it was acknowledged that the Commission has several ways of pursuing functions and enforcing the Market Access Strategy and thus has a choice of means that should be used as appropriate. The TBR procedure may in view of the time involved in some cases not be the most suitable way forward to take for the Commission, though it may have merits as a means of stressing concern, seeking compliance with international rules short of dispute resolution and putting up pressure.

For industry the TBR procedure should be the main vehicle to trigger WTO dispute settlement procedures, at least to the extent that the specific industry concern is not already taken up by the respective government representatives and thus fed into other channels.

C: EU interest standard

Clearly, there was a need to be conscious of not setting precedents that could impact inappropriately or negatively on other areas of EU trade policy.

D: Bilateral agreements

The majority of Member State representatives supported the extension of the right of EU enterprises to invoke obligations stemming from the EU’s bilateral agreements. However more and more Central and East European Countries have become WTO members so the issue was seen by some countries as decreasing.

E: Confidentiality

Some Member State representatives reported the impression that EU enterprises are sometimes somewhat reluctant to lodge a TBR complaint because they fear it will backfire on them. Hence, the possibility of some form of anonymity in the complaints process was supported.
F: Most Burdensome Aspects of the TBR Complaints Procedure

Almost all Member State representatives agreed with past users and EU industry that the most burdensome aspect of the TBR complaints procedure was establishing injury and adverse trade effects, on the one hand, and the causal effect as well as the evidential burdens of doing so. In the case of the smaller Member States, it was difficult for some of their industries by themselves to show a wider impact of the adverse trade effects.

One Member State representative expressed the view that the existence of a trade barrier in contradiction of a rule of international trade has to be sufficient to start the procedure without proving injury or causation.

The length of the process also came in for criticism. One concern with the TBR process is the variable length of time that cases can take from their initiation to completion. This is not always seen as harmful as in some cases this is due to protracted negotiations going on behind the scene with the third country concerned with a view to resolving the issue without recourse to WTO dispute settlement. However, it creates a negative impression if TBR cases remain on the TBR Committee’s agenda for a long time without regular updates.

G: Publicity

An information campaign directed to possible end-users of the TBR was suggested. Also, it was said that it would be useful with a helpdesk for companies to contact at the European Commission as was done in the Anti-Dumping Unit of DG Trade.
9. Recommendations for Enhancement of the TBR

1. The TBR and the Market Access Strategy

As far as the interaction between the Market Access Strategy and the TBR is concerned, the TBR should continue to play its part as one of the instruments available to pursue the removal of obstacles to trade under the Strategy and steps taken to enhance its role through closer interaction with the Market Access Unit. Nevertheless, some kind of filtering process must be applied within DG–Trade to make an evaluation of which barriers are appropriate for action under the TBR. This should, in our view, be the role of the Market Access Unit in implementation of the Market Access Strategy’s objective of removing trade barriers in increasing the competitiveness of EU industry and exports of goods, services, investment and ideas.

The TBR team should maintain its status as an entity functioning independently from the Market Access Unit and retain its ability to receive TBR complaints directly from EU industry and enterprises. We believe that the current location of the TBR team as part of the Dispute Settlement Unit is appropriate for this purpose and its proper functioning. Internal mechanisms and/or processes should be put in place to coordinate communications to remove trade barriers maintained by the EU’s trading partners and which undermine the competitiveness of EU industry. Rather than resurrecting the MAAG, a more constructive proposal is for less formal, but more regular, reporting mechanism between the MAU and the TBR team.

Obviously, decisions to initiate action under the TBR cannot be taken within any internal Commission reporting system since they require a complaint from an EU industry or enterprise (or in theory a Member State) and follow a prescribed decision-making process. However, there is clearly scope for the TBR team to add its input into this process and, where appropriate, assist the Market Access Unit in performing its functions.
2. Practical Aspects

A: Evaluation of Prima Facie Cases

Past users, and potential users with a reasonable knowledge of the instrument, have stated that the complaint and supporting evidence expectations that are apparently contained in the TBR do not match those applied by the TBR team in reality. To some extent, this sentiment was also echoed by some national representatives.

We agree that there is a gap between the TBR Regulation’s specific provisions on lodging complaints and the standards that have to be applied by the TBR Team when vetting a complaint. On the face of it, the TBR Regulation requires little information and/or evidence for the lodging of a complaint. On the other hand, minimum standards of argumentation and evidence are essential for the proper functioning of the TBR, especially when international dispute settlements proceedings may ultimately be taken.

In terms of factors within the control of the TBR Team, there seems justification for clarifying the standards applied in making assessments of whether a TBR complaint meets the threshold of being a *prima facie* case. We are aware that the TBR Team has published a Brochure on the TBR Process and guidance for complainants on the website of DG Trade. In our view, this may not, however, be enough for potential future TBR users. The formulation of a model complaint, published on DG-Trade’s Internet site may be the start of the process to close the distance between the perceived complaint requirements and reality. At the other end of this spectrum is the possibility of publishing formal Guidelines on this question. In our view, an accommodation somewhere in the middle of these extremes is to be preferred.

To a certain extent, this predicament must be primarily addressed and resolved by effective information communication processes directed towards EU industry and enterprises. This is because it is difficult to support the proposition that the standards for vetting TBR complaints should be lowered. Such an approach will simply build up inevitably problematic issues that will have to be dealt with later in the procedure and, in the worst case scenario, under the spotlight of a WTO dispute settlement process.
As far as the claims that the preliminary vetting standard for TBR complaints being too high are concerned, the fact that past users, potential users and some national representatives on the TBR Committee have all expressed the same view, must give cause for reflection. This is especially so when the focus of this criticism has revolved mainly around one feature, namely the need to demonstrate injury and/or adverse trade effects. Here, there is some room for manoeuvre.

It seems reasonable to assume that in most cases, perhaps only a few of the indicators of adverse trade effects in particular may be relevant (and sufficient) to demonstrate the damage being caused by a specific trade barrier. These will, of course, vary according to the specific circumstances in question and the kind of obstacle to trade. Allowing greater concentration on fewer specific economic indicators that would be sufficient to adequately illustrate the damage caused by an obstacle to trade could be a more efficient approach. Certainly, it should not be necessary to provide information and/or evidence for potentially irrelevant economic indicators mentioned in the TBR Regulation (although we acknowledge that neither the TBR itself nor the practice of the European Commission’s TBR Team require all the criteria to be satisfied).

Consequently, we recommend that, in the evaluation of TBR complaints for the purposes of establishing a prima facie case, greater latitude and/or allowance is given where complainants are able to demonstrate adverse trade effects (or injury) in terms of fewer factors that are specifically relevant to their individual circumstances. In other words, a more targeted and specific assessment of this aspect of the TBR’s requirements seems merited.

B: Greater Involvement of the Complainant in Settlement Negotiations

TBR complainants must be more actively involved in the negotiation of a settlement designed to remove a trade barrier. It should not be necessary for the consent of the complainant before the European Commission is able to enter into a settlement agreement. However, the Commission must find ways to ensure that complainants are fully engaged in securing effective solutions with which they are comfortable.
C: Evidence of Adverse Trade Effects

In the course of the examination procedure, allowing greater precision and specification to which economic indicators would adequately illustrate the damage caused by an obstacle to trade will alleviate this burden. The WTO dispute settlement process does not allow scope for the use of best information available. On the other hand, such procedures, at first instance at least, do not necessarily require proof of injury where there is a violation of a WTO legal obligation.

The requirement of injury and/or adverse trade effects should therefore be applied in a way that establishes that a complainant has a real and tangible interest in pursuing a remedy to tackle and obstacle to trade but not so rigorously as to discourage complainants from pursuing remedies in the form of the TBR. Admittedly this is a difficult balance to strike and is more of a practical, as opposed to legal, matter.

D: Confidentiality of the Complainant

The TBR complaint procedure does not contain provisions to protect the identity and confidentiality of the complainant. Ways must be found to allow the complaint procedure to be triggered anonymously if the potential complainant so requests.

E: Greater Resources Given to the EC Commission DG-Trade

Consideration should be given to the deployment of more resources inside DG-Trade to support of EU industry and enterprises in the preparation of a TBR complaint. Requirements in respect of the admissibility of the submission should be more balanced and reasonable. Greater assistance must be forthcoming to help gather evidence and detailed information on infringements operated by governments.

This may be provided by a unit other than the TBR Team and the obvious candidate is the Market Access Unit.

F: Action to Encourage the Move Away From the 133 Procedure

The current situation is that the TBR is losing business to the 133 procedure as far as EU industries seeking direct and immediate access to the WTO dispute settlement procedures are concerned. We are not
convinced that this situation is particularly unhealthy. Nor has there been any significant feedback from industry that the current status quo does not suit their needs.

Attempts to challenge more potential WTO dispute settlement procedures through the TBR rather than the 133 procedure may in fact be counter-productive. Member States may not support such a change because the current situation appears to function in their interests. Hence, no action in this context is proposed.

3. Legislative Revisions

A: Fusion of Standing Requirements for EU Industries and Enterprises

The rationale for distinguishing between complaints made by EU industries, on the one hand, and those by EU enterprises (and associations thereof) on the other has not provided useful in practice. Equally, the logic of distinguishing between trade barriers having an effect inside the EU market from those having an effect on export markets, is no longer persuasive.

We recommend that Articles 3 and 4 of the TBR are revised to remove this distinction and to eradicate the artificial nature of a complainant having to prove itself as an EU industry in order to complain about obstacles to trade inside the EU. The “EU enterprise” concept has proved itself over the last ten years to be sufficiently flexible and wide in scope to become the sole standard for establishing a right of access to the TBR procedure.

Such a reform will, of course, require adjustments to other applicable concepts used in the TBR, such as injury and/or adverse trade effects. However, in our view, this streamlining and simplification is desirable in any event in its own right.

B: Removal of Restrictions Preventing Reliance on Bilateral Agreements

We recommend that the TBR is revised to remove the restriction contained in Article 4(1) of the instrument which prevents EU enterprises and associations thereof from relying on the obligations contained in bilateral trade agreements which the EU has entered into with some of its trading partners.
Given the change of policy of the EU towards the negotiation of bilateral agreements, and the incorporation of more robust dispute settlement procedures into them, it may be advisable to establish some point in time, after which reference to bilateral agreements may be made (e.g. 1st January, 2000). This would facilitate the creation of a cut-off point in time to distinguish between those agreements with more robust and useful dispute settlement provisions and their predecessors.

Otherwise, bilateral agreements upon which reliance can be made could be defined by their type (e.g. customs union agreements, free trade agreements, etc) to give greater specification to the kinds of bilateral agreements which could be invoked.

**C: Change in the 45 days Pre-initiation Period**

We recommend that either the 45 days period granted under Article 5(4) of the TBR is extended to a more reasonable period or, alternatively, a fast track internal approval process is instigated inside the EC Commission to give more time to the TBR team to properly analyse complaints, request additional information and/or evidence and act within a prescribed time period which should be respected.

**D: The Examination Procedure**

We believe that the existing period of between 5 and 7 months to complete this examination procedure is reasonable and does not excessively delay an investigation as a factor on its own.

**E: Member State Referral Procedure**

Effectively, Article 6 of the TBR, and the procedures for referral by a Member State for action under the TBR by the European Commission’ have fallen into desuetude. There seems little realistic possibility that these provisions will even be activated in like to the alternative options available to Member States for starting WTO dispute-settlement procedures. Equally, Member States are uncomfortable with using these provisions because of concerns that their interests might be deliberately targeted by foreign trading partners whose practices are the focus of attention under the TBR.
On the other hand, there is no harm in maintaining these procedures in the TBR Regulation since they are relatively separate from the decision-making and substantive provisions contained in the Regulation. We do not consider reform in this context to be essential.

**F: Amendment of the Concept of Injury**

It the event that fusion of the concepts of “EU industry” and “EU enterprises is accepted, and the distinction between obstacles to trade inside the EU and in export markets eradicated, the concept of injury (as stated in Article 10(1)) would require significant adjustment.

Our strong preference is for the concept of “adverse trade effects” to be modified and to play the central role in defining the existence of distortions adversely affecting Community enterprises for the purposes of lodging a complaint under the TBR. Hence, the list of factors referred to as establishing injury would become relevant as a point of reference for interpreting the concept of adverse trade effects.

**G: Change in the Definition of Adverse Trade Effects**

The definition of adverse trade affects in Article 10(4) of the TBR Regulation should be modified by substituting the term “distorted” for the term “diverted” in the expression “prevented, impeded or diverted.” Similarly, modification of the terms of Article 4(1) would be required to change the term “effect on the market of a third country” or “effect on the market of the EU or a third country.”

**H: The Concept of EU Interest**

The EU interest test is an important aspect of the TBR Regulation and must be retained as a “safety value” for TBR cases that could potentially compromise the interests of the EU as a whole. The Commission’s current practice is also in line with the proper application of this concept.

**I: Introduction of Time Limits for Negotiated Settlements**

The TBR Regulation makes no reference to any time periods for the pursuit of a negotiated settlement. Past and potential users of the TBR have pointed to this as a fundamental flaw in the fabric of the TBR.
From a legal perspective, it is also undesirable that the investigation enters into an unlimited and undefined time frame.

Clarification of this issue is recommended and naturally any such reform should be tied in with the potential semi-automatic triggering of dispute settlement procedures upon the expiry of a reasonable period of time. The precise period of time that should be imposed is a matter for the European Commission to decide in light of possible political sensitivities.

**J: Semi-Automatic Triggering of WTO Consultation Processes**

In our view, the semi-automatic triggering of WTO dispute settlement procedures, action under the dispute resolution provisions of bilateral trade agreements, or indeed both, within a defined time period would be the single most significant enhancement of the TBR as an effective instrument for tackling barriers impeding market access. It would encourage EU industry to use the TBR as a means of bringing trading partners maintaining illegal obstacles to trade to account under the threat of an effective remedial process.

While fully automatic triggering of dispute settlement procedures is probably not politically feasible, reforms could be framed in such a way that, in the event of certain occurrences not taking place, dispute settlement action should be started. For example, one possibility is to require the European Commission to confirm that, within a certain period of time, a trading partner maintaining an obstacle to trade has entered into discussions, in good faith and in a prompt and responsive manner, with a view to resolving this matter. If the Commission is unable or unwilling to confirm that this is the so within the specified time frame, dispute settlement procedures must be started.

It is open to the EU institutions to decide precisely what this period should be but it is essential to link it to the expiry of the period of time during which negotiated settlements should normally be pursued.

**K: Monitoring Actions**

The suspension of TBR proceedings for further monitoring discourages trading partners to remove a trade barrier and simply seems to place TBR investigations into a state of legal limbo. This is unsatisfactory from the point of view of both legal certainty and user satisfaction.
Hence, we recommend that a maximum period be prescribed for monitoring actions which can be renewed for limited additional periods only after the European Commission reports on actions taken to remove obstacles to trade being monitored within a regular time frame.

4. Improving the Visibility of the TBR in EU Industry

A: Marketing actions

The level of awareness among EU enterprises of the TBR is very low indeed. This explains why very few TBR cases have been filed by EU enterprises. Action must be taken to remedy this situation and the publication of the EC Commission’s Brochure describing how to making a TBR complaint is helpful in this context. It is, however, probably not sufficient in itself.

B: Targeting the EU services sector

There is a particularly acute lack of awareness in the EU services sector of the possibility of bringing TBR cases to improve market access for services even where the proper GATS commitments are in place. The problem is not structural but based on lack of knowledge. Again action is required to correct this situation.

5 Institutional issues

In the view of both the EC Commission and the Member States’ representatives was that, from a general perspective, the current EU institutional framework could be considered adequate.

However, TBR Committee meetings should either be organised more often or written status reports sent more frequently, including the plan of action by the Commission trying to solve the problems. The reports should also be sufficiently detailed for the circumstances of each case.
ANNEX A

THE WTO PROCEDURE

Commission requests WTO consultations

Consultations (60 days)

Request for establishment of a Panel

Panel established

Panel Report

Notification of Appeal (maximum 60 days from Panel Report)

Appellate Body Report (2-3 months from appeal)

DSB adopts Appellate Body Report (maximum 12 months from establishment)

DSB adopts Panel Report (maximum 9 months from Panel establishment)

Implementation (within the reasonable period, maximum 15 months from Report)

Enforcement mechanisms

Retaliation and sanctions Compensation procedure
## ANNEX B

### Summary of TBR Cases

<table>
<thead>
<tr>
<th>Case</th>
<th>Basis for the TBR complaint</th>
<th>Complainant</th>
<th>Year</th>
<th>Country</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Rules of origin for textile and apparel products</td>
<td>Federtessile</td>
<td>1996</td>
<td>USA</td>
</tr>
<tr>
<td>2.</td>
<td>Import licensing regime for steel plates</td>
<td>Eurofer</td>
<td>1997</td>
<td>Brazil</td>
</tr>
<tr>
<td>3.</td>
<td>Restrictions on the marketing of Cognac</td>
<td>BNIC</td>
<td>1997</td>
<td>Brazil</td>
</tr>
<tr>
<td>4.</td>
<td>Restrictions in the leather sector</td>
<td>Cotance</td>
<td>1997</td>
<td>Japan</td>
</tr>
<tr>
<td>5.</td>
<td>The Anti-dumping Act of 1916</td>
<td>Eurofer</td>
<td>1997</td>
<td>USA</td>
</tr>
<tr>
<td>6.</td>
<td>Cross-border music licensing requirements</td>
<td>IMRO</td>
<td>1997</td>
<td>USA</td>
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<tr>
<td>7.</td>
<td>Restrictions on export and import of leather</td>
<td>Cotance</td>
<td>1997</td>
<td>Argentina</td>
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<tr>
<td>8.</td>
<td>Restrictions on imports of Sorbitol</td>
<td>Cerestar BV</td>
<td>1998</td>
<td>Brazil</td>
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<tr>
<td>9.</td>
<td>Restrictions on textile products</td>
<td>Febeltex</td>
<td>1998</td>
<td>Brazil</td>
</tr>
<tr>
<td>10.</td>
<td>Restrictions on shipping of swordfish</td>
<td>ANAPA</td>
<td>1998</td>
<td>Chile</td>
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<tr>
<td>11.</td>
<td>Marketing requirements for cosmetics and toiletries</td>
<td>Colipa</td>
<td>1998</td>
<td>Korea</td>
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<tr>
<td>12.</td>
<td>Discriminatory measures for pharmaceutical products</td>
<td>EFPIA</td>
<td>1999</td>
<td>Korea</td>
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<tr>
<td>13.</td>
<td>Restrictions on imports of textile and clothing</td>
<td>Euratex</td>
<td>1999</td>
<td>Argentina</td>
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<td>14.</td>
<td>Proex export financing</td>
<td>Dorner GmbH</td>
<td>1999</td>
<td>Brazil</td>
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<td>15.</td>
<td>Failing to protect Parma Ham i/p rights</td>
<td>CPP</td>
<td>1999</td>
<td>Canada</td>
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<td>17.</td>
<td>Restriction on the prepared mustard</td>
<td>FICF</td>
<td>2001</td>
<td>USA</td>
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<td>18.</td>
<td>Lack of protection of the wines with geographical indication &quot;Bordeaux&quot; and &quot;Medoc&quot;</td>
<td>CIVB</td>
<td>2002</td>
<td>Canada</td>
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<td>19.</td>
<td>Subsidisation of shipbuilding industry</td>
<td>CESA</td>
<td>2002</td>
<td>Korea</td>
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<td>20.</td>
<td>Measures concerning import of pharmaceutical products</td>
<td>EFPIA</td>
<td>2003</td>
<td>Turkey</td>
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<td>21.</td>
<td>Subsidisation of oilseed production</td>
<td>EOA</td>
<td>2003</td>
<td>USA</td>
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<td>22.</td>
<td>Import ban and financial penalties on imported retreaded tyres</td>
<td>BIPAVER</td>
<td>2004</td>
<td>Brazil</td>
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<td>23.</td>
<td>Restrictions on the Scotch whisky</td>
<td>SWA</td>
<td>2004</td>
<td>Uruguay</td>
</tr>
</tbody>
</table>
### ANNEX C

**Summary of Responses of Past TBR Users**

<table>
<thead>
<tr>
<th>TBR Subject Matter *</th>
<th>Complainant</th>
<th>Initial request made</th>
<th>Consent to participate</th>
<th>Questionnaire Response Received</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rules of origin for textile and apparel products</td>
<td>Federtessile</td>
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<td>√</td>
</tr>
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<td>√</td>
<td>Unwilling to co-operate</td>
<td>x</td>
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<td>Cotance</td>
<td>√</td>
<td>√</td>
<td>√</td>
</tr>
<tr>
<td>The Anti-dumping Act of 1916</td>
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<td>√</td>
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<td>Restrictions on imports of textile and clothing</td>
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<td>Subsidisation of shipbuilding industry</td>
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<td>Import ban and financial penalties on imported retreaded tyres</td>
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<td>Restrictions on Scotch whisky</td>
<td>SWA</td>
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* In those cases where the complainant is not identified above, no contact was possible for this project.
## ANNEX D

### Participation of EU Trade Associations

<table>
<thead>
<tr>
<th>EU Trade Associations</th>
<th>Questionnaire received</th>
<th>General contacts</th>
<th>Follow-up interview</th>
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<tr>
<td>1. UNICE √</td>
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<td>9. Eurolait</td>
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<td>15. EFPIA</td>
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<td>16. CEFS</td>
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<td>17. Orgalime</td>
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<td>19. ECTA</td>
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### Participation of National Trade Associations

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<th>Questionnaire received</th>
<th>General contacts</th>
<th>Members Assisting</th>
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<tr>
<td>1. VNC √</td>
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<td>2. EVO √</td>
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<td>3. Confed. Swedish Enterprise</td>
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<td>4. APSR √</td>
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<td>5. BDI √</td>
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<td>6. PCLA √</td>
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<td>7. SWA √</td>
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<td>8. CTPA √</td>
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<td>9. CBI √</td>
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<td>10. APSR √</td>
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<td>11. Dutch Cement Association</td>
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<td>12. Cyprus Plastics Association</td>
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<tr>
<td>13. UNICE national members</td>
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<td>14. Febelplast √</td>
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<td>15. Romanian Glass Assoc.</td>
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## ANNEX E

### List of EU WTO Dispute Settlement Requests

<table>
<thead>
<tr>
<th>WTO DS Reference</th>
<th>Subject Matter of EC Action</th>
<th>Country</th>
<th>TBR Action</th>
<th>Article 133 Action</th>
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<tbody>
<tr>
<td>DS8</td>
<td>Taxes on Alcoholic Beverages</td>
<td>Japan</td>
<td></td>
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<tr>
<td>DS15</td>
<td>Measures affecting the purchase of telecommunications equipment</td>
<td>Japan</td>
<td></td>
<td>✓</td>
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<tr>
<td>DS38</td>
<td>The Cuban Liberty and Democratic Solidarity Act</td>
<td>USA</td>
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<tr>
<td>DS39</td>
<td>Tariff increases on products from the European Communities</td>
<td>USA</td>
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<tr>
<td>DS40</td>
<td>Laws, Regulations and Practices in the Telecommunications Procurement Sector</td>
<td>Korea</td>
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<tr>
<td>DS42</td>
<td>Measures concerning Sound Recordings</td>
<td>Japan</td>
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<tr>
<td>DS54</td>
<td>Certain Measures Affecting the Automobile Industry</td>
<td>Indonesia</td>
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<tr>
<td>DS53</td>
<td>Customs Valuation of Imports</td>
<td>Mexico</td>
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<tr>
<td>DS63</td>
<td>Anti-Dumping Measures on Imports of Solid Urea from the Former German Democratic Republic</td>
<td>USA</td>
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<td>✓</td>
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<tr>
<td>DS66</td>
<td>Measures Affecting Imports of Pork</td>
<td>Japan</td>
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<td>✓</td>
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<tr>
<td>DS73</td>
<td>Procurement of a Navigation Satellite</td>
<td>Japan</td>
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<tr>
<td>DS75</td>
<td>Taxes on Alcoholic Beverages</td>
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<tr>
<td>DS77</td>
<td>Measures Affecting Textiles and Clothing</td>
<td>Argentina</td>
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<tr>
<td>DS79</td>
<td>Patent Protection for Pharmaceutical and Agricultural Chemical Products</td>
<td>India</td>
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<tr>
<td>DS81</td>
<td>Certain Measures Affecting Trade and Investment in the Automotive Sector</td>
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<td>DS85</td>
<td>Measures Affecting Textiles Apparel Products</td>
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<td>DS88</td>
<td>Measure Affecting Government Procurement</td>
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<tr>
<td>DS96</td>
<td>Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products</td>
<td>India</td>
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<tr>
<td>DS98</td>
<td>Definitive Safeguard Measure on Imports of Certain Dairy Products</td>
<td>Korea</td>
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<tr>
<td>DS100</td>
<td>Measures Affecting Imports of Poultry Products</td>
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<td>DS107</td>
<td>Export Measures Affecting Hides and Skins</td>
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<td>DS108</td>
<td>Tax Treatment for &quot;Foreign Sales Corporations&quot;</td>
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<td>DS110</td>
<td>Taxes on Alcoholic Beverages</td>
<td>Chile</td>
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<td>DS114</td>
<td>Patent Protection of Pharmaceutical Products</td>
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<td>DS116</td>
<td>Measures Affecting Payment Terms for Imports</td>
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<td>DS117</td>
<td>Measures Affecting Film Distribution Services</td>
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<td>DS118</td>
<td>Harbour Maintenance Tax</td>
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<td>DS120</td>
<td>Measures Affecting Export of Certain Commodities</td>
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<tr>
<td>DS121</td>
<td>Safeguard Measures on Imports of Footwear</td>
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<td>DS136</td>
<td>Anti-Dumping Act of 1916</td>
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<tr>
<td>DS138</td>
<td>Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</td>
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<td>DS142</td>
<td>Certain Measures Affecting the Automotive Industry</td>
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<td>DS145</td>
<td>Countervailing Duties on Imports of Wheat Gluten from the European Communities</td>
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<td>DS146</td>
<td>Measures Affecting the Automotive Sector</td>
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<td>DS147</td>
<td>Tariff Quotas and Subsidies Affecting Leather</td>
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<td>DS149</td>
<td>Import Restrictions – Request for Consultations by the European Communities</td>
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<td>DS151</td>
<td>Measures Affecting Textiles and Apparel Products (II)</td>
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<td>DS152</td>
<td>Sections 301–310 of the Trade Act of 1974</td>
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<td>DS155</td>
<td>Measures Affecting the Export of Bovine Hides and the Import of Finished Leather</td>
<td>Argentina</td>
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<td>DS157</td>
<td>Definitive Anti-Dumping Measures on Imports of Drill Bits from Italy</td>
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<td>DS160</td>
<td>Section 110(5) of US Copyright Act</td>
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<td>DS165</td>
<td>Import Measures on Certain Products from the European Communities</td>
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<td>DS176</td>
<td>Section 211 Omnibus Appropriations Act of 1998</td>
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<td>DS183</td>
<td>Measures on Import Licensing and</td>
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<td>DS186</td>
<td>Minimum Import Prices</td>
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<td>DS189</td>
<td>Definitive Anti-dumping Measures on Imports of Ceramic Floor Tiles from Italy</td>
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<td>DS213</td>
<td>Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</td>
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<td>Continued Dumping and Subsidy Offset Act of 2000</td>
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<td>DS225</td>
<td>Anti-Dumping Duties on Imports of Seamless Pipe from Italy</td>
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<td>DS248</td>
<td>Definitive Safeguard Measures on Imports of Certain Steel Products</td>
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<td>DS262</td>
<td>Sunset Reviews of Anti-Dumping and Countervailing Duties on Certain Steel Products from France and Germany</td>
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<td>DS273</td>
<td>Measures Affecting Trade in Commercial Vessels</td>
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<td>Import Restrictions Maintained under the Export and Import Policy 2002–2007</td>
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<td>DS287</td>
<td>Quarantine regime for imports</td>
<td>Australia</td>
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<td>DS294</td>
<td>Laws, Regulations and Methodology for Calculating Dumping Margins (&quot;Zeroing&quot;)</td>
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<td>DS304</td>
<td>Anti-dumping measures on imports of certain products from the European Communities and/or Member States</td>
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<td>DS314</td>
<td>Provisional Countervailing Measures on Olive oil from the European Communities</td>
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<td>DS319</td>
<td>Section 776 of the Tariff Act of 1930</td>
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<td>DS320</td>
<td>Hormones dispute</td>
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<td>Hormones dispute</td>
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## ANNEX F

### LEGAL PROVISIONS INVOKED IN TBR COMPLAINTS

<table>
<thead>
<tr>
<th>Title</th>
<th>Short description of measures</th>
<th>Legal provisions invoked in complaint</th>
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<tbody>
<tr>
<td>USA - Rules of origin for textiles</td>
<td>Changes in the US origin rules for textile products: cotton, silk and man-made fibres fabrics imported in the EU at loom state to be dyed and printed and flat products deriving therefrom no longer qualify as of EU origin.</td>
<td>Articles 2.4 and 4.2 WTO Agreement on Textiles and Clothing. Article 2 on WTO Agreement on Rules of Origin.</td>
</tr>
<tr>
<td>USA Antidumping Act of 1916</td>
<td>US trade defence instrument (Anti-dumping Act of 1916) which consists of prohibiting importers from importing or selling articles from any foreign country at a price substantially less than the market value or wholesale price of such articles, at the time of importation, in the country of production or other foreign countries to which they are commonly exported.</td>
<td>Articles III : 4, VI GATT 1994 ; Articles 1,2,3,5,9,3,10,11.1,8.4 WTO Anti-Dumping Agreement ; Article XVI :4 WTO Agreement</td>
</tr>
<tr>
<td>Argentina Hides and Skins ; finished leather</td>
<td>Argentinean tacit ban on exports of raw and semi-tanned bovine hides and discriminatory internal taxes on imports of finished leather (additional VAT and advance payment of income tax).</td>
<td>Articles II : 2 (c), III :2, VII [in particular, Article VII :2], VIII :1(a), X :3(a), XI GATT 1994</td>
</tr>
<tr>
<td>Brazil - Cognac</td>
<td>Brazilian lack of protection of Cognac appellation of origin. Excessive administrative requirements and discriminatory taxation applicable to imports of Cognac in Brazil.</td>
<td>Articles 2,3,4,23,65(5) TRIPs ; Articles 9,10,10 bis,10ter Paris Convention for the Protection of Industrial Property ; Madrid Agreement for the Repression of False or Deceptive Indications of Source on Goods ; Article 12(2) of the EC-Brazil Framework Agreement ; Article 9 of the EU-Mercosur Framework Agreement</td>
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<tr>
<td>Japan - Leather</td>
<td>Management of the tariff quota system for leather and subsidies granted to leather industry and Dowa population.</td>
<td>Articles VIII, X, XI GATT 1994 ; Articles 5, 6 Agreement on Subsidies and Countervailing Measures ; Articles 1.6, 3.5(g), (h), (I) and (j) WTO Agreement on Import Licensing Procedures</td>
</tr>
<tr>
<td>Country</td>
<td>Issue Description</td>
<td>Relevant Articles/Agreements</td>
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<tr>
<td>--------------</td>
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<tr>
<td>USA – Music licensing</td>
<td>US legislation on Copyright which exempts restaurants, bars, shops or any other public venue from the obligation to obtain licences for the broadcast of music works by radio or T.V, provided certain conditions are met in terms of floor surface and number of audio-visual devices.</td>
<td>Article 9 TRIPs ; Article 11(a) Berne Convention for the Protection of Literary and Artistics Works</td>
</tr>
<tr>
<td>Brazil – Steel</td>
<td>Brazilian non-automatic licensing system applied to certain steel products and operating through compulsory payment terms.</td>
<td>Articles XI, III(4), X GATT 1994. Articles 1(4), 3(3), 5 and 1(9) for the Agreement on Import Licensing Procedures</td>
</tr>
<tr>
<td>Brazil – Textiles</td>
<td>Brazilian non-automatic import licensing system applied to textile products and operating through compulsory payment terms and minimum prices.</td>
<td>Articles 1, 3 WTO Agreement on Import Licensing Procedures ; Articles II :1 (b), X, XI :1, XV GATT 1994</td>
</tr>
<tr>
<td>Korea – Cosmetics</td>
<td>Korean standard and other requirements that adversely affect import and marketing of EU cosmetics products in Korea.</td>
<td>Articles 5(1)(1) and 5(1)(2) of the WTO Agreement on Technical Barriers to Trade ; Article III :4 GATT 1994</td>
</tr>
<tr>
<td>Chile – Swordfish</td>
<td>Chilean prohibition on the transit and transhipment of swordfish in Chilean ports.</td>
<td>Article V GATT 1994 ; Articles 2(3), 5(4), 6 WTO Agreement on the Application of Sanitary and Phytosanitary Measures</td>
</tr>
<tr>
<td>Brazil – Sorbitol</td>
<td>Brazilian minimum import price system applied to Sorbitol operating through a non-automatic import-licensing regime or via the customs valuation system. Investigation extended to Carboxymethylcellulose (CMC) exports to Brazil. The practices concerned are similar to those investigated during the FEBELTEX case.</td>
<td>Articles I :1, X :1, X :3(a), XI GATT 1994 ; Articles 1(3) and (4), 3(2), 3(3), 3(5)(e) and (f), 5 WTO Agreement on Import Licensing Procedures ; Article 4(2) WTO Agreement on Agriculture</td>
</tr>
<tr>
<td>Brazil – Regional aircraft</td>
<td>Export subsidies granted by the Brazilian export-financing programme « PROEX » to purchasers of the Brazilian 30-seat regional jet Embraer ERJ-135.</td>
<td>Articles 3 [in particular, 3(1)(a)], 4,5 WTO Agreement on Subsidies and Countervailing Measures ; Article III : 4 GATT 1994</td>
</tr>
<tr>
<td>Canada – Prosciutto di Parma</td>
<td>Lack of protection of geographical indication of « Prosciutto di Parma ». Absence of appropriate legal remedies to effectively redress unfair</td>
<td>Article 22 Trade-Related Aspects of Intellectual Property Rights (“TRIPs”) ; Article 10bis, 10ter Paris Convention for the Protection of Literary and Artistic Works</td>
</tr>
<tr>
<td>Country</td>
<td>Issue Description</td>
<td>Article/Cause of Action</td>
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<tr>
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<tr>
<td>Korea - Pharmaceuticals</td>
<td>Discrimination in rules and practices concerning pricing and reimbursement of pharmaceutical products affecting trade of EU pharmaceutical products in the Korean market.</td>
<td>Article III :4 GATT 1994</td>
</tr>
<tr>
<td>Argentina - Textiles</td>
<td>Certain measures affecting import of textile and clothing products: repetition of pre-shipment controls and customs valuation which penalise imports; excessive requirements concerning certificates of origin which impedes transhipment of goods together with excessive customs documentation and labelling.</td>
<td>Articles VII :2, VIII :1©,X :1, XI GATT 1994 ; Articles 1 to 6 and 7.2(f) and (g) Agreement on Implementation of Article VII GATT 1994 ; Article 2.3 Agreement on Pre-shipment Inspection ; Article 7(1)(a) Agreement on Textiles and Clothing</td>
</tr>
<tr>
<td>Colombia - Cars</td>
<td>Colombian VAT regime which provides for a distinction between vehicles in the category up to 1400 cc assembled or manufactured in Colombia subject to a VAT rate of 20% compared with a VAT rate of 35% for those manufactured or assembled outside Colombia.</td>
<td>Article III :2 GATT 1994</td>
</tr>
<tr>
<td>US - prepared mustard</td>
<td>Suspension of trade concessions applied by the US following to the ‘Hormones case’ in the WTO, regarding prepared mustard the; the US measure only applies to exports originating in certain EU Member States (excluding United Kingdom)</td>
<td>Articles 3 and 22 of the Dispute Settlement Understanding (DSU) and Article I and II of the GATT 1994</td>
</tr>
<tr>
<td>Korea - shipbuilding</td>
<td>Subsidies including export guarantees, export financing, debt forgiveness, debt-for-equity-swaps, interest relief and special tax concessions in the context of preferential restructuring packages</td>
<td>Articles 3 and 5 of the WTO Agreement on Subsidies and Countervailing Measures (“ASCM”).</td>
</tr>
<tr>
<td>Canada - Bordeaux Médoc</td>
<td>Lack of protection of the wines with geographical indication “Bordeaux” and Médoc”.</td>
<td>Articles 23.1 and 2 as well as Article 24.3 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)</td>
</tr>
<tr>
<td>Turkey - pharmaceuticals</td>
<td>Lack of transparency, discriminatory application of the pharmaceutical import, sales and marketing system, including discrimination in pricing</td>
<td>Breach of both Article 39.3 of the TRIPS Agreement and the explicit Turkish commitments under the EC-Turkey Customs Union</td>
</tr>
<tr>
<td>Country</td>
<td>Description</td>
<td>Violations</td>
</tr>
<tr>
<td>-------------------------</td>
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<td>-----------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>US - subsidies for oilseed production</td>
<td>Subsidies granted in the United States to oilseed producers</td>
<td>Some of the US oilseed subsidies would be protected by the “peace clause” (article 13 of the Agreement on Agriculture). For others, the level of the US support in the 2001 marketing year appear to have had significant price effects, but the Commission does not have sufficient evidence at this stage to reach a final conclusion on whether they cause or threaten to cause serious injury.</td>
</tr>
<tr>
<td>Brazil - Import Ban on Retreaded Tyres</td>
<td>Import ban and financial penalties relating to imported retreaded tyres.</td>
<td>Violations of WTO provisions, notably of Articles XI:1, III:4, I:1 and XIII:1 of the GATT 1994 not justified on grounds of environmental or health protection.</td>
</tr>
<tr>
<td>Uruguay - Whisky</td>
<td>The complaint concerns alleged trade barriers maintained by Uruguay which affect exports and sales of Scotch whisky. The complaint addresses four related issues of concern: (a) a condition that whiskies be aged less than three years to benefit from an inclusion in the lowest tax band of IMESI; (b) a requirement to affix strip stamps on imported whiskies only; (c) a perceived lack of transparency and predictability in the administration of the IMESI; (d) a requirement to make advance payments of IMESI applicable only to importers;</td>
<td>Under investigation</td>
</tr>
</tbody>
</table>
Notes


2. 23 cases have been initiated under the TBR itself. One case started under the NCPI has been carried forward under the TBR, namely *Thailand – Piracy of Sound Recordings*.


4. Article 4(1), *Trade Barrier Regulation*.

5. Article 3(1), *Trade Barrier Regulation*.

6. Article 2(5)(b), *Trade Barrier Regulation*.

7. Article 6(1), *Trade Barrier Regulation*.

8. Article 2(4), *Trade Barrier Regulation*.

9. Article 2(3), *Trade Barrier Regulation*.

10. Article 10(1), *Trade Barrier Regulation*.

11. Article 10(2), *Trade Barrier Regulation*.

12. For example, the EU’s Basic Anti-Dumping and Anti-Subsidy Regulations.

13. Article 12(1), *Trade Barrier Regulation*.


15. Articles 12(1), 12(2) and 13(2), *Council Regulation (EC) 3286/94*.


17. MAS Communication, Para 13.

See Council Decision of 24 September 1998 on the implementation by the Commission of activities relating to the EU market access strategy (98/552/EC)

http://mkaccdb.eu.int/

World Trade Organization, Ministerial Conference, Fourth Session, Doha, 9–14 November 2001 (WT/MIN(01)/DEC/W/1, 14 November 2001 (01–5769))

Originally the negotiations also covered new rules in the areas of competition, investment, transparency in government procurement and trade facilitation, commonly referred to as the “Singapore issues”. In the so-called “July Package”, adopted by the WTO General Council on 1 August 2004, all these issues except trade facilitation were, however, removed from the negotiating package.

The NTA was adopted at the 1995 EU–US Summit in Madrid.

The TEP Action Plan was adopted by the EU Foreign Ministers, following an EU–US summit in London in May 1998. The Plan provides for initiatives at both multilateral and bilateral levels. Bilaterally, the Commission is authorised to negotiate with the US the removal of regulatory barriers to trade in goods and services.

MAS Communication, Para 27.


The Council of Ministers, in endorsing the Barrier Removal Programme, added two additional criteria, namely: (i) the need to take into account the interests of small and medium sized enterprises; and (ii) the interests of specific regions affected by particular trade barriers, Council Minutes, supra note 4, p.6.

The programme itself was initially only endorsed for a period of 18 months by the Member States and is no longer in effect.


These cases are summarised in Annex B.

More details concerning the precise provisions relied on, and the measures in question, are specified in Annex E.

In some cases, the TBR complainants had ceased to exist and in other cases (particularly earlier ones) changes in personnel and contact persons made meaningful contact impossible. Other past users declined to participate in this project.

Decision No. 1/95 of the EC – Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union.


The US has now finally repealed the WTO inconsistent 1916 Anti-Dumping Act, more than four years after the adoption of the Panel’s and Appellate Body’s reports. However, some cases brought in front of US courts before the repeal, are nevertheless pending decisions in accordance with the illegal legislation.

This is known as the Article 133 procedure because the authority to conduct external trade policy is vested in the EU by Article 133 of the EC Treaty as amended by the Treaty of Nice.

For example, in WTO dispute settlement, the panel system was retained and panellists could be selected from a wide range of disciplines and specialisations, not only international trade law. These include diplomats, economists, senior trade policy officials and academics.


See Recital (6), Trade Barrier Regulation.

Cross-border trade in services was considered sufficiently similar to trade in goods to be included under Article 133.

See Opinion 1/94 on the competence of the EU to conclude international agreements concerning services and the protection of intellectual property, [1994] ECR I-05267, Paras. 44 and 95-96.


Article 10(1)(b), Trade Barrier Regulation.

Article 10(1)(c), Trade Barrier Regulation.
Judgment of 14\textsuperscript{th} December 2004, not yet reported.

Article 8(1), Trade Barrier Regulation.

Article 11(1), Trade Barrier Regulation.

Article 12(1), Trade Barrier Regulation.

Paras [89] to [92], FICF v EC Commission, supra note 47.

Articles 5(2) and 5(3), Trade Barrier Regulation.

Article 2(5), Trade Barrier Regulation.

T-317/02, Paras. 187–192, not yet reported.


Unjustifiable acts, policies or practices are those that violate or are inconsistent with the international legal rights of the US, including the denial of national or MFN treatment or the right to establish or protect intellectual property rights.


Telecommunications 301, or Section 1377 of the Omnibus Trade and Competitiveness Act of 1988, is found at 19 U.S.C. § 3106.

Super 301 is found at 19 U.S.C. § 2420(a)(1)(A)–(B).

See, for example, Written Question P–3468/00 by Daniel Varela Suarez-Carpegna to the EC Commission on European Shipbuilding Industry, O.J. C151/179 (22.05.2001)

Article 7(1), Council Regulation (EC) 3286/94.

Article 7(2), Council Regulation (EC) 3286/94.